THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

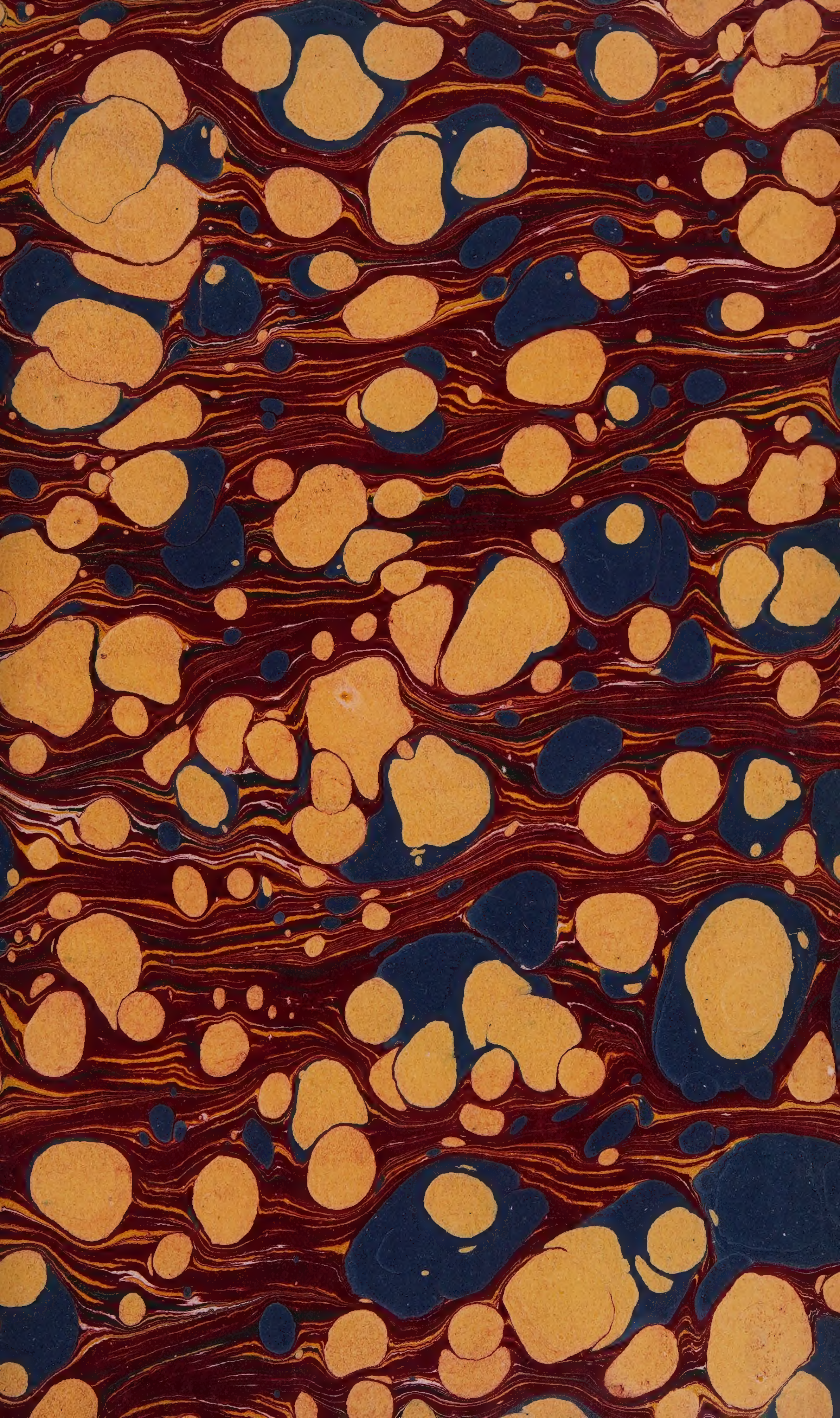
346.4 Mx Nortt

UNIVERSITY OF LONDON

THE LIBRARY.

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-queens-bench_188-1881_7



REFERENCE ONLY

346.4
Mx. North Gall.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—JOSEPH BROWN, Esq., Q.C.

EX-OFFICIO MEMBERS.

SIR HENRY JAMES, Knt., M.P.	ATTORNEY-GENERAL.
SIR FARRER HERSCHELL, Knt., M.P.	SOLICITOR-GENERAL.

ELECTED MEMBERS.

MR. SERJEANT SIMON, M.P. MR. SERJEANT PULLING.	Serjeants' Inn.
W. B. GLASSE, Esq., Q.C. HORACE DAVEY, Esq., Q.C., M.P.	Lincoln's Inn.
JOHN BLOSSETT MAULE, Esq., Q.C. ARTHUR CHARLES, Esq., Q.C.	Inner Temple.
JOSEPH BROWN, Esq., Q.C. ALFRED WILLS, Esq., Q.C.	Middle Temple.
JOHN A. RUSSELL, Esq., Q.C. WILLIAM CRACROFT FOOKS, Esq., Q.C.	Gray's Inn.
WILLIAM WILLIAMS, Esq. (Firm—Messrs. Currie, Williams, & Williams), Lincoln's Inn Fields JOHN HOLLAMS, Esq. (Firm—Messrs. Hollams, Son, & Coward), Mincing Lane, E.C.	Incorporated Law Society.

Secretary—JAMES THOMAS HOPWOOD, Esq., 10 Old Square, Lincoln's Inn.

THE

LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Supreme Court of Judicature.

CASES DETERMINED IN THE

QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

AND DECISIONS ON

CROWN CASES RESERVED.

Editor—J. R. BULWER, Q.C.

Reporters.

Court of Appeal	JOHN E. HALL, WILLIAM PATERSON,	*Barristers-at-Law.*
Queen's Bench AND Crown Cases Reserved.	ARTHUR P. STONE, EDMUND LUMLEY, JOHN SCOTT, JOHN ROSE, JAMES M. MOORSOM, ALEX. MORTIMER, CYRIL DODD.	*Barristers-at-Law.*

VOL. VII.

1880–81.—XLIV & XLV VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, Limited,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1881.

BIBL.

JUDGES

OF

THE COURT OF APPEAL.

XLIV & XLV VICTORIÆ.

Lord Selborne, Lord Chancellor.

Sir George Jessel, Master of the Rolls.

The Right Honourable John Duke, Lord Coleridge, Lord Chief Justice of England.

Sir William Milbourne James, Sir Richard Baggallay, Sir George Wilshere Bramwell, Sir William Baliol Brett, Sir Henry Cotton, Sir Robert Lush.	Ordinary Judges of Court of Appeal.

JUDGES

OF

THE QUEEN'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

XLIV & XLV VICTORIÆ.

The Right Hon. JOHN DUKE, Lord COLERIDGE,
Lord Chief Justice of England, President.
The Hon. Sir WILLIAM R. GROVE, Knt.
The Hon. GEORGE DENMAN.
The Hon. Sir CHARLES EDWARD POLLOCK, Knt.
The Hon. Sir NATHANIEL LINDLEY, Knt.
The Hon. Sir WILLIAM VENTRIS FIELD, Knt.
The Hon. Sir JOHN WALTER HUDDLESTON, Knt.
The Hon. Sir HENRY MANISTY, Knt.
The Hon. Sir HENRY HAWKINS, Knt.
The Hon. Sir HENRY CHARLES LOPES, Knt.
The Hon. Sir JAMES FITZJAMES STEPHEN, Knt.
The Hon. Sir CHARLES S. C. BOWEN, Knt.
The Hon. Sir WATKIN WILLIAMS, Knt.
The Hon. Sir LEWIS WILLIAM CAVE, Knt.
The Hon. Sir JAMES CHARLES MATHEW, Knt.

ATTORNEY GENERAL:

Sir HENRY JAMES, Knt.

SOLICITOR GENERAL:

Sir FARRER HERSCHELL, Knt.

ERRATA.

Queen's Bench Division.

Page	Lines	For	Read
269	8 from bottom	“Datton”	“Dalton”

	For	Substitute
437	Words in note (1)	*Wilby* v. *Elston*, 8 C. B. 142; 18 L. J. (C.P.) 320.

Page	Lines	For	Read
463	bottom line	“were”	“where”
464	2 from top	“he”	“be”
502	13 from top	“Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 3.”	“Elementary Education Act, 1870 (33 & 34 Vict. c. 75) s. 3.”
508	9 from bottom	“s. 37”	“s. 33”

Pages	For	Substitute
526, 527	Fitzgerald, L.J.	Fitzgibbon, L.J.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1881, will be as follows:—

In the First Series,
18 Ch. D.

In the Second Series,
7 Q. B. D. 6 P. D.

In the Third Series,
6 App. Cas.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Accidental Insurance Company, Lawrence *v.* 216
Akerblom *v.* Price (C. A.) 129
Alderson *v.* Maddison (C. A.) 174
Alresford Rural Sanitary Authority *v.* Scott 210
Amazon Tug and Lighterage Company, Robertson *v.* (C. A.) 598
Atherton, Hardy *v.* 264

B.

Bank of England, Suffell *v.* 270
Barter *v.* Dubeux (C. A.) 413
Basker, Eaton *v.* (C. A.) 529
Bewicke *v.* Graham (C. A.) 400
Bradford *v.* Symondson (C. A.) 456
Bradlaugh, Clarke *v.* 151
———, ——— *v.* (C. A.) 38
Bree *v.* Marescaux (C. A.) 434
British India Steam Navigation Company *v.* Commissioners of Inland Revenue 165

C.

PAGE

Cave *v.* Hastings 125
Chaine, Hamilton *v.* 1
———, ——— *v.* (C. A.) 319
Chapman *v.* Royal Bank of Scotland 136
Charman, Culley *v.* 89
Claridge, Seal *v.* (C. A.) 516
Clarke *v.* Bradlaugh 151
——— *v.* ——— (C. A.) 38
Conelly *v.* Steer (C. A.) 520
Coquetdale, Justices of, White *v.* 238
Corry *v.* Great Western Railway Company (C. A.) 322
Cramer *v.* Matthews 425
Cullerne, Richards *v.* (C. A.) 623
Culley *v.* Charman 89
Currey, Robinson *v.* (C. A.) 465

D.

Davis *v.* Justices of Pembrokeshire 513
Dixon *v.* Metropolitan Board of Works 418

PAGE

Doubleday, Lilley *v.* 510
Drake *v.* Footit 201
——— *v.* Hankin 201
Dubeux, Barter *v.* (C. A.) 413
Duncan, Reg. *v.* 198
Dyson *v.* London and North Western Railway Company 32

E.

Eaton *v.* Basker (C. A.) 529
Edwards, Ex parte 155
Erichsen *v.* Last 12

F.

Fennell, Reg. *v.* (C. C. R.) 147
Fergusson, Gilbertson *v.* (C. A.) 562
Field, McMahon *v.* (C. A.) 59
Fletcher *v.* Hudson (C. A.) 611
Footitt, Drake *v.* 201
Foyer, Ryhope Coal Company *v.* 485
Fulham, Guardians of *v.* Guardians of Thanet (C. A.) 539

G.

Gathercole *v.* Smith (C. A.) 626
Gilbertson *v.* Fergusson (C. A.) 562
Gloucester Waggon Company, Saxby *v.* 305
Goodman, Corporation of Saltash *v.* (C. A.) 106
Graham, Bewicke, *v.* (C. A.) 400
Great Western Railway Company, Corry, *v.* (C. A.) 322
——————————— *v.* Railway Commissioners (C. A.) 182
Green, Ex parte (C. A.) 273

H.

Hall, Wake *v.* (C. A.) 295
Hamilton *v.* Chaine 1
——— *v.* ——— (C. A.) 319

PAGE

Handsley, Reg. *v.* 398
Hankin, Drake *v.* 201
Hardinge, Smalley *v.* (C. A.) 524
Hardy *v.* Atherton 264
Hare *v.* Overseers of Putney (C. A.) 223
Harmon *v.* Park 369
Harper, Reg. *v.* (C. C. R.) 78
Harris *v.* Truman 340
Hastings, Cave *v.* 125
Heys, Pearson *v.* 260
Hill, Sparrow *v.* 362
Holl, Reg. *v.* (C. A.) 575
Home, McLaren *v.* 477
Honck *v.* Muller (C. A.) 92
Hudson, Fletcher *v.* (C. A.) 611
Hughes *v.* Sutherland 160

I.

Inland Revenue, Commissioners of, British India Steam Navigation Company *v.* 165

J.

Jackson, School Board for London *v.* 502
Johnson *v.* Raylton (C. A.) 438

L.

Lancashire and Yorkshire Railway, Marsden *v.* (C. A.) 641
Last, Erichsen *v.* 12
Lawrence *v.* Accidental Insurance Company 216
Lilley *v.* Doubleday 510
Liskeard Union *v.* Liskeard Waterworks 505
Liskeard Waterworks, Liskeard Union *v.* 505
Loch, Waller *v.* (C. A.) 619
London and North Western Railway Company, Dyson *v.* 32
London, School Board for *v.* Jackson 502
Lyons *v.* Tucker (C. A.) 523

PAGE

M.

McLaren *v.* Home 477
McMahon *v.* Field (C. A.) 591
Maddison, Alderson *v.* (C. A.) 174
Maltby, In re 18
Marescaux, Bree *v.* (C. A.) 434
Marsden *v.* Meadows (C. A.) 80
Marsden and Wife *v.* Lancashire and Yorkshire Railway Company (C. A.) 641
Marwood *v.* Wright (C. A.) 62
Matthews, Cramer *v.* 425
Meadows, Marsden *v.* (C. A.) 80
Mercantile Steamship Company *v.* Tyser 73
Metropolitan Board of Works, Dixon *v.* 418
Minors, Poyser *v.* (C. A.) 329
Moore, Reg. *v.* 542
Most, Reg. *v.* 244
Muller, Honck *v.* (C. A.) 92

N.

New Zealand and Australian Land Company *v.* Watson (C. A.) 374

P.

Park, Harmon *v.* 369
Parkyns *v.* Preist 313
Pearson *v.* Heys 260
Pembrokeshire (Justices of), Davis *v.* 513
Pookes, Royle, Re 9
Portsea Union (Guardians of), Reg. *v.* 384
Poyser *v.* Minors (C. A.) 329
Preist, Parkyns *v.* 313
Price, Akerblom *v.* (C. A.) 129
Putney (Overseers of), Hare *v.* (C. A.) 223

R.

Raffalovich, Wilson *v.* (C. A.) 553

PAGE

Railway Commissioners, Great Western Railway Company *v.* (C. A.) 182
Raylton, Johnson *v.* (C. A.) 438
Reg. *v.* Duncan 198
Reg. *v.* Fennell (C. C. R.) 147
Reg. *v.* Guardians of Portsea Union 384
Reg. *v.* Handsley 398
Reg. *v.* Harper (C. C. R.) 78
Reg. *v.* Holl (C.A.) 575
Reg. *v.* Moore 542
Reg. *v.* Most 244
Reg. *v.* Whitchurch (C. A.) 534
Richards *v.* Cullerne (C. A.) 623
Richardson, Saunders *v.* 388
Robertson *v.* Amazon Tug and Lighterage Company (C. A.) 598
Robinson *v.* Currey (C. A.) 465
Royal Bank of Scotland, Chapman *v.* 136
Ryhope Coal Company, The, *v.* Foyer 485

S.

Saltash (Corporation of) *v.* Goodman (C. A.) 106
Saunders *v.* Richardson 388
Saxby *v.* Gloucester Waggon Company *v.* 505
Scott, Alresford Rural Sanitary Authority *v.* 210
Seal *v.* Claridge (C. A.) 516
Smalley *v.* Hardinge (C. A.) 524
Smith, Gathercole *v.* (C. A.) 626
Sparrow *v.* Hill 362
Steer, Conelly *v.* (C. A.) 520
Strugnell, Wilson *v.* 548
Suffell *v.* Bank of England 270
Sutherland, Hughes *v.* 160
Symondson, Bradford *v.* (C. A.) 456

T.

Thanet (Guardians of), Fulham, Guardians of *v.* (C. A.) 539
Truman, Harris *v.* 340

PAGE
Tucker, Lyons *v.* (C. A.) 523
Tyser, Mercantile Steamship Company *v.* 73

U.

Unwin, Wilkins *v.* (C. A.) 636

W.

Wake *v.* Hall (C. A.) 295
Waller *v.* Loch (C. A.) 619
Watson, New Zealand and Australian Land Company *v.* (C. A.) 374
Whitchurch, Reg. *v.* (C. A.) 534
White *v.* Justices of Coquetdale 238
Wilkinson *v.* Unwin (C. A.) 636
Wilson *v.* Raffalovich (C. A.) 553
Wilson *v.* Strugnell 548
Wright *v.* Marwood (C. A.) 62

TABLE OF CASES CITED.

A.

		PAGE
Abbott *v.* Richards	15 M. & W. 194	432
Aberdeen Commercial Company *v.* Great North of Scotland Railway Company	3 Nev. & Macn. 205	184, 185, 188, 194, 197
Abrey *v.* Crux	Law Rep. 5 C. P. 37	637
Adams *v.* Lloyd	3 H. & N. 351	402
Adamson *v.* Newcastle Steamship Freight Insurance Association	4 Q. B. D. 462	76
Æolus, The	Law Rep. 4 A. & E. 29	130
Aldous *v.* Cornwell	Law Rep. 3 Q. B. 573	271
Allsop *v.* Day	7 H. & N. 547	83
Alston *v.* Underhill	1 C. & M. 492	152
Anderson *v.* Bank of British Columbia	2 Ch. D. 644	401, 411
Appleby *v.* Myers	Law Rep. 2 C. P. 651	602
Armstrong *v.* Stokes	Law Rep. 7 Q. B. 598	378
Attorney General *v.* Alexander	Law Rep. 10 Ex. 20	16, 17, 566
——— *v.* Great Northern Railway Company	1 D. & Sm. 154	185
——— *v.* Mutual Tontine Westminster Chambers Association	Law Rep. 10 Ex. 305; 1 Ex. D. 469	138, 141, 143

B.

Bagott *v.* Orr	2 B. & P. 472	109, 116
Baldey *v.* Parker	2 B. & C. 37	531
Barber *v.* Fleming	Law Rep. 5 Q. B. 69	75
Barnett *v.* Hooper	1 F. & F. 412, 467	557
Barrett *v.* Johnson	2 Jones (Ir. Ex.) 197	468
Bartholomew *v.* Carter	4 Man. & G. 612	480
Bates *v.* Hewitt	Law Rep. 2 Q. B. 595	77
Batthyany *v.* Bouch	50 L. J. (Q.B.) 421	162
Baumann *v.* James	Law Rep. 3 Ch. App. 508	127, 128
Beadon Doe d. *v.* Pyke	5 M. & S. 146, at p. 154	525
Beaufort, Duke of *v.* Mayor, &c., of Swansea	3 Ex. 413	110, 114
Benbow *v.* Low	50 L. J. (Ch.) 35	402
Bennet *v.* Manchester, Sheffield, and Lincolnshire Railway Company	6 C. B. (N.S.) 707	185
Bentham *v.* Hoyle	3 Q. B. D. 289	33, 37
Bigge *v.* Parkinson	7 H. & N. 955	441
Bishop *v.* Hayward	4 T. R. 470	637
Bolton *v.* Corporation of Liverpool	1 My. & K. 88	402

		PAGE
Bone *v.* Ekless	5 H. & N. 925	551
Botterill *v.* Whytehead	41 L. T. (N.S.) 588	620
Boulton *v.* Jones	2 H. & N. 564	442
Boyce *v.* Higgins	14 C. B. 1	467
Boyd *v.* Durand	2 Taunt. 161	152
Boydell *v.* Drummond	11 East, 142	127
Bradford *v.* Williams	Law Rep. 7 Ex. 259	96, 102
Brand *v.* Hammersmith Railway Company	Law Rep. 1 Q. B. 130	423
British Columbia Saw Mill Company *v.* Nettleship	Law Rep. 3 C. P. 499	511
British Waggon Company *v.* Lea & Co.	5 Q. B. D. 149	442
Britten *v.* Webb	2 B. & C. 483	640
Brook, Ex parte. Roberts, In re	10 Ch. D. 100, at p. 110	525
Broughton *v.* Midland Great Western Railway Company	1 Ir. C. L. Rep. 169	423
Brown *v.* Byrne	3 E. & B. 703	441
—— *v.* Great Eastern Railway Company	2 Q. B. D. 406	35
—— *v.* London and North Western Railway Company	4 B. & S. 326	15
Burchfield *v.* Moore	3 E. & B. 683	272
Burrows *v.* March Gas and Coke Company	Law Rep. 5 Ex. 67, on appeal Law Rep. 7 Ex. 96	512
—— *v.* ——	Law Rep. 7 Ex. 96	593
Bustros *v.* White	1 Q. B. D. 423	401, 405, 407, 408, 409, 556
Buxton, Ex parte. Muller, In re	15 Ch. D. 289	526
—— *v.* Rust	Law Rep. 7 Ex. 1, 279	127

C.

Calliford *v.* Blawford	1 Show. 353; Carth. 232, nom Culliford *v.* Blandford	468, 471
Campbell *v.* Strangeways	3 C. P. D. 105	152
Carpenter *v.* Pearce	27 L. J. (Ex.) 143	433
Carr *v.* London and North Western Railway Company	Law Rep. 10 C. P. 307	357
Carter *v.* Boehm	3 Burr. 1905	459
——, Ex parte	12 Ch. D. 908	321
—— *v.* Muscot	4 Burr. 2162	108
Castrique *v.* Bernabo	6 Q. B. 498	152
Caton *v.* Caton	Law Rep. 2 H. L. 127	175
Cattley *v.* Arnold	1 J. & H. 651	324
Catton *v.* Simpson	8 A. & E. 136	272
Challiner, Ex parte, Rogers, In re	16 Ch. D. 260	3, 4, 5, 7, 8, 319, 320, 321
Chance *v.* Adams	1 Ld. Raym. 77	468
Chapman *v.* Royal Netherlands Steam Navigation Company	4 P. D. 157	128, 131, 137
Charing Cross Advance and Deposit Bank, Parker, In re	16 Ch. D. 35	3, 4, 5, 319, 617
Chatterley Iron Company *v.* North Staffordshire Railway Company	3 Nev. & Macn. 238	184, 194
Chick *v.* Smith	8 Dowl. 337	152
Chorlton *v.* Dickie	13 Ch. D. 160	415
Church *v.* Imperial Gas Light and Coke Company	6 Ad. & E. 846, at pp. 860, 861, 862	531

		PAGE
Churchward *v.* The Queen	Law Rep. 1 Q. B. 173	47
City Bank, Ex parte	Law Rep. 3 Ch. App. 758	167, 169, 173
Clayards *v.* Dethick	12 Q. B. 439	594
Cobb *v.* Becke	6 Q. B. 930	155, 377
Colborne, Ex parte	Law Rep. 11 Eq. 478	167, 169
Colchester (Mayor of) *v.* Brooke	7 Q. B. 339	109
Coles *v.* Trecothick	9 Ves. 234, at p. 251, per Lord Eldon, C.	518, 519
—— *v.* Pilkington	Law Rep. 19 Eq. 174	175
Collins *v.* Welch	5 C. P. D. 27	642, 643, 644
Combe *v.* Corporation of London	1 Y. & C. Ch. 631	402
—— *v.* Pitt	3 Burr. 1434	152
Cooke, Ex parte. Strachan, In re	4 Ch. D. 123	379
Cooper, Ex parte. Baum, In re	10 Ch. D. 320	85
Corbett, Ex parte. Shand, In re	14 Ch. D. 122	526
Cork and Bandon Railway Company *v.* Goode	13 C. B. 826	469
Cort *v.* Ambergate Railway Company	17 Q. B. 127	442
Couch *v.* Steel	3 E. & B. 402; 23 L. J. (Q.B.) 121	600, 601, 608
Couston, Ex parte	Law Rep. 8 Ch. 520	358
Credit Company *v.* Pott	6 Q. B. D. 295	4
Crooks *v.* Allan	5 Q. B. D. 38	60
Cull *v.* Backhouse	6 Taunt. 148, n.	378
Cutter *v.* Powell	Sm. L. C. 8th ed. p. 48	97

D.

Da Costa *v.* Edmunds	4 Camp. 142	65
Dale and Enraght's Case	6 Q. B. D. 376	276, 280, 282, 283, 288, 290
Davis *v.* Garrett	6 Bing. 716	510, 511, 512, 592
—— *v.* Goodman	5 C. P. D. 128	517, 520, 521
Davies *v.* Snead	Law Rep. 5. Q. B. 608, 611	621, 622
De Bussche *v.* Alt	8 Ch. D. 286	378
Dearden *v.* Townsend	Law Rep. 1 Q. B. 10	37
Death *v.* Harrison	Law Rep. 6 Ex. 15	431
Deverill *v.* Burnell	Law Rep. 8 C. P. 475	97
Ditton, Ex parte. Woods, In re	3 Ch. D. 459	526
Dobell *v.* Hutchinson	3 A. & E. 355	128
Dunn *v.* Birmingham Canal Company	Law Rep. 7 Q. B. 244	423
Dyer *v.* Best	Law Rep. 1 Ex. 152	468, 470, 472, 474

E.

Edwards *v.* Overseers of Rusholme	Law Rep. 4 Q. B. 554	226
Eldridge *v.* Burgess	7 Ch. D. 411	415
Eliza, The	Lush. Adm. 536	132
Elwes *v.* Mawe	3 East, 38	301
European and Australian Royal Mail Company *v.* Peninsular and Oriental Steam Navigation Company	14 L. T. (N.S.) 704	162
Evans *v.* Nicholson	32 L. T. (N.S.) 778. Cited in *Taylor* v. *Jones*, 1 C. P. D. 87	435

F.

		PAGE
Felkin *v.* Lord Herbert	30 L. J. (Ch.) 798	401
Field *v.* Great Northern Railway Company	3 Ex. D. 261	365
Fitton *v.* Accidental Death Insurance Company	17 C. B. (N.S.) 122	218
Flatcher *v.* Boodle	18 C. B. (N.S.) 152	229
Fleet *v.* Murton	Law Rep. 7 Q. B. 126	443
Fouldes *v.* Willoughby	8 M. & W. 540	510
Fowler *v.* Lock	Law Rep. 7 C. P. 272; Law Rep. 9 C. P. 551, n.; Law Rep. 10 C. P. 90	600
—— *v.* ——	Law Rep. 7 C. P. 272	602
Frederick, The	1 Wm. Rob. 17	132
Freeman *v.* Cooke	2 Ex. 654	175
—— *v.* Inland Revenue Commissioners	Law Rep. 6 Ex. 101	167
Freeth *v.* Burr	4 B. & S. 296	97
Freshfield *v.* Reed	9 M. & W. 404	518, 519
Frith *v.* Cartland	2 H. & M. 417	356

G.

Gardner *v.* Walsh	5 E. & B. 83	272
Gerhard *v.* Bates	2 E. & B. 476	250, 252
Gibson *v.* Carruthers	8 M. & W. 333	442
Gilbertson *v.* Fergusson	5 Ex. D. 57	16, 17
Glynn *v.* East and West India Dock Company	6 Q. B. D. 475	511
Godfrey *v.* Furzo	3 P. Wms. 185	356
Goodall *v.* Little	20 L. J. (Ch.) 132	401
Gould *v.* Oliver	4 Bing. (N.C.) 134	65
Goupy *v.* Harden	7 Taunt. 159	637
Great Australian Gold Mining Company *v.* Martin	5 Ch. D. 1	436, 437
Great Western Railway Company *v.* Bishop	Law Rep. 7 Q. B. 550	424
Greig *v.* University of Edinburgh	Law Rep. 1 H. L., Sc. 348	229
Gunter *v.* Halsey	Amb. 586	178

H.

Hadkinson *v.* Robinson	3 B. & P. 388	76
Hadley *v.* Baxendale	9 Ex. 341	510, 512, 593, 595
Hallett's Estate, In re	13 Ch. D. 396, 707	356, 357, 358
Hall *v.* Newcomb	3 Hill (N.Y.) 233	638
Hamlyn *v.* Betteley	5 C. P. D. 327	3, 4, 5
Hammersley *v.* De Biel	11 Cl. & F. 45	175
Hanley *v.* Cassan	11 Jur. 1088	158
Harnett *v.* Vise	5 Ex. D. 307	642
Harper, In re	9 B. & C. 691	158
Harrison *v.* Bush	5 E. & B. 344	621
Hartley *v.* Owen	34 L. T. 752	557
Harwich Case	30 O'M. & H. part ii. p. 71	479, 482
Heald *v.* Carey	11 C. B. 977	511
Hentig *v.* Staniforth	5 M. & S. 122, and nom. *Henry* v. *Staniforth*, 4 Camp. 270	457, 459

		PAGE
Herbert *v.* Dean and Chapter of Westminster	1 Y. & C. Ch. 103	406
Hill *v.* Peel	Law Rep. 5 C. P. 172	480, 482
Hills *v.* Renny	5 Ex. D. 313	431
Hoare *v.* Rennie	5 H. & N. 19	96, 97, 100, 102, 104, 105
Hobbs *v.* London and South Western Railway Company	Law Rep. 10 Q. B. 111	511, 592, 593, 594, 596, 597
Hoey *v.* Felton	11 C. B. (N.S.) 142	593
Hollingbourne Union *v.* West Ham Union	6 Q. B. D. 580	385, 387
Hollins *v.* Fowler	Law Rep. 7 H. L. 757	379
Hudson *v.* Tooth	3 Q. B. D. 46	281, 283
Humfrey *v.* Dale	7 E. & B. 266	443
Hunt *v.* Wimbledon Local Board	4 C. P. D. 48	530, 532, 533
Hurley *v.* Milward	Jo. & Ca. (Irish) 224	66
Hutchinson *v.* Tatham	Law Rep. 8 C. P. 482	443
Hutton *v.* Warren	1 M. & W. 466	441
Hyman *v.* Nye	6 Q. B. D. 685	602, 604

J.

Jackson, In re	Law Rep. 12 Eq. 354	358
Jay, Ex parte; Blenheim, In re	Law Rep. 9 Ch. 697	518
Jenkins *v.* Bushby	35 L. J. (Ch.) 400	402, 403, 409
Johnson *v.* Chapman	19 C. B. (N.S.) 563	64, 65, 66, 69, 71
——— & Reay *v.* Nicoll & Son	18 Scottish Law Rep. 268; 8 Court Sess. Cas. 4th series, 437	440, 441
Jonassohn *v.* Young	Law Rep. 9 C. P. 208	97
Jones *v.* Just	Law Rep. 3 Q. B. 197	441, 450
—— *v.* Monte Video Gas Company	5 Q. B. D. 556	401, 404, 406, 407, 408, 410, 411
—— *v.* Orchard	16 C. B. 614	551
Jonge, Andries, The	Swa. Adm. Rep. 226	130
Joseph Harvey, The	1 Ch. Rob. 306	130

K.

Kingston, Ex parte; Gross, In re	Law Rep. 6 Ch. 632	379
Kine *v.* Sewell	3 M. & W. 297	620
King *v.* Hawkesworth, Re	4 Q. B. D. 371	329
Knape, Anders, The	4 P. D. 213	130
Knatchbull *v.* Hallett	13 Ch. D. 696	377, 379, 383
Knight *v.* Purssell	49 L. J. (Ch.) 120	363, 365, 367, 368

L.

Lang *v.* Spicer	1 M. & W. 129	264, 265
Lanyon *v.* Blanchard	2 Camp. 597	379
Lawrence *v.* Fletcher	12 Ch. D. 858	155
Lewis *v.* Carr	1 Ex. D. 484	613, 614, 616, 617, 618
——— *v.* Davis	Law Rep. 10 Ex. 90	470
Lincoln, Mayor, &c., of *v.* Holmes Common	Law Rep. 2 Q. B. 482	230
Liverpool Borough Bank *v.* Turner	1 J. & H. 159	162
Loffus *v.* Maw	3 Giff. 592	179
Long *v.* Millar	4 C. P. D. 450	127, 128

		PAGE
Lookup *v.* Frederick	4 Burr. 2018	468, 472
Lowrey *v.* Barker	5 Ex. D. 170	526
Lumley *v.* Gye	2 E. & B. 216	181
Lyons *v.* Tucker	6 Q. B. D. 660	521, 522

M.

Maans *v.* Henderson	1 East, 335	378
McCall *v.* Taylor	34 L. J. (C.P.) 365	79
MacFadden *v.* Jenkyns	1 Ph. 153, 157	356
Mackersy *v.* Ramsay	9 Cl. & F. 818	378
Mackley *v.* Chillingworth	2 C. P. D. 273	482
Malcolmson *v.* O'Dea	10 H. L. C. 618	108, 112
Maldon (Mayor of) *v.* Woolvet	12 Ad. & E. 13	109
Manchester (Overseers of) *v.* St. Pancras	4 Q. B. D. 409	385, 387
Mann *v.* Forester	4 Camp. 60	378
Mannall *v.* Fisher	5 C. B. (N.S.) 856	110
Mansell *v.* Feeney	2 J. & H. 320	402, 409, 411
Mapleback, In re	4 Ch. D. 150, 156	358
Martin, Ex parte	4 Q. B. D. 212, 491	624
——— *v.* Bannister	4 Q. B. D. 491	624, 625
——— *v.* Strong	5 Ad. & Ell. 535	620
Mason *v.* Kiddle	5 M. & W. 513, at p. 514, per Alderson, B.	517, 520
Master *v.* Miller	4 T. R. 320; in error 2 Hen. Bl. 141	271, 272
Meiklereid *v.* West	1 Q. B. D. 428	162, 163
Mellor *v.* Denhan	5 Q. B. D. 467	535, 536, 537, 538
Mersey Docks *v.* Cameron	11 H. L. C. 443	229, 234
Merchant Banking Company of London *v.* Phœnix Bessemer Steel Co.	5 Ch. D. 205	441
Merrick *v.* Hundred of Ossulston	Cases temp. Hardwicke, 412	475
Metropolitan Asylum District *v.* Hill	6 App. Cas. 193	423
Metropolitan Board of Works *v.* West Ham Overseers	Law Rep. 6 Q. B. 193	230, 234, 237
Miller *v.* Salomons	7 Ex. 475; sub nom Salomons *v.* Miller, 8 Ex. 778	47
Mills, Ex parte. In re Manning	Law Rep. 6 Ch. 594	415
Milward *v.* Hibbert	3 Q. B. 120	65, 66, 68
Minet *v.* Morgan	Law Rep. 8 Ch. 361	401, 403
Moon *v.* Guardians of Witney Union	3 Bing. (N.C.) 814	378
Morris *v.* Walker	15 Q. B. 589	638, 639
Murphy, In re	2 Q. B. D. 397	392, 395, 396
Myers *v.* Defries	4 Ex. D. 176	643
Myler *v.* Fitzpatrick	6 Mad. 360	378

N.

National Mercantile Bank, Haynes, In re	15 C. D. 42	4, 319, 320, 321, 517, 520
Natusch *v.* Hendewerk	7 Q. B. D. 460, n.	460, 463
Nicholson *v.* Fields	7 H. & N. 810; 21 L. J. (Ex.) 233	613, 614, 616, 617
Norton *v.* Florence Land and Public Works Company	7 Ch. D. 332	168
Nunn *v.* Fabian	Law Rep. 1 Ch. 35	175

O.

		PAGE
Odell, Ex parte, In re Waldon	10 Ch. D. 76	83
O'Farrell *v.* Stephenson	4 Ir. Law Rep. 715	526, 527, 528
Oom *v.* Bruce	12 East. 225	457, 459
Orford, Mayor of, *v.* Richardson	4 T. R. 437	108

P.

Paragon, The	Ware (Maine U. S.) 322	66
Peto *v.* Reynolds	23 L. J. (Ex.) 98; 9 Ex. 410; 11 Ex. 418	79
Philpot *v.* Swann	11 C. P. (N.S.) 270	76
Pickard *v.* Sears	6 Ad. & E. 469	175
Porchester, Lord, *v.* Petrie	3 Douglas Rep. by Roscoe, 216	152
Pordage *v.* Cole	1 Wm. Saund. 319	97, 100, 104, 105
Prince *v.* Oriental Bank Corporation	3 App. Cas. 325	378
Prole *v.* Soady	2 Giff. 1	175
Pryce *v.* Monmouthshire Railway and Canal Company	4 App. Cas. 197	191

R.

Rabone *v.* Williams	7 T. R. 360; n.	378
Readhead *v.* Midland Railway Company	Law Rep. 2 Q. B. 412	604
Reg. *v.* All Saints, Wigan	1 App. Cas. 611, at p. 620	579
—— *v.* Baldry	2 Den. C. C. 430	149
—— *v.* Bate	11 Cox C. C. 686	150
—— *v.* Bertrand	Law Rep. 1 P. C. 520	199, 200
—— *v.* Brackenridge	Law Rep. 1 C. C. 133	48
—— *v.* Burrows	7 Q. B. D. 577, n.	579
—— *v.* Chorley	12 Q. B. 515	199
—— *v.* Doherty	13 Cox. C. C. 23	150
—— *v.* Edwards	9 Ex. 32, 628	152, 153
—— *v.* Fox	19 W. R. 109	250
—— *v.* Garner	1 Den. C. C. 329	149, 150
—— *v.* Gillis	11 Cox. C. C. 69	149
—— *v.* Hughes	4 Q. B. D. 614	28
—— *v.* Hulme	Law Rep. 5 Q. B. 377	578, 585
—— *v.* Ipswich Union	2 Q. B. D. 269	386
—— *v.* Jarvis	Raw Rep. 1 C. C. R. 96	149
—— *v.* Johnson	2 E. & E. 613	198, 199
—— *v.* Lancashire, Justices of	Law Rep. 6 Q. B. 97	543, 544, 546, 547
—— *v.* Leigh	10 A. & E. 398	199
—— *v.* Luckhurst	6 Cox. C. C. 243	150
—— *v.* Lundie	31 L. J. (M.C.) 157	35
—— *v.* Metropolitan Board of Works	Law Rep. 4 Q. B. 15	230, 233
—— *v.* Middlesex	12 L. J. (M.C.) 36	398, 399
—— *v.* ——	Law Rep. 6 Q. B. 781	240, 243
—— *v.* Price	Law Rep. 6 Q. B. 411	578, 580, 583, 584, 585, 587, 588, 589, 590
—— *v.* Reeve	Law Rep. 1. C. C. R. 362	150
—— *v.* Rogers	3 Q. B. D. 34	435

		PAGE
Reg. v. Rowell	Law Rep. 7 Q. B. 490	543, 544
—— v. Russell	3 E. & B. 942	198
—— v. Saddlers' Company	32 L. J. (Q. B.) 345	35
—— v. Scaife	17 Q. B. 238	199, 200
—— v. Shaw	34 L. J. (M.C.) 169	29
—— v. Sleeman	6 Cox. C. C. 245	150
—— v. Steel	2 Q. B. D. 37	578
—— v. Thornton, Inhabitants of	2 E. &. E. 788; 29 L. J. (M.C.) 162	324
—— v. Wallingford Union	10 Ad. & E. 259	508
Reid v. Clarke	7 T. R. 496	204, 205, 207
Reuter v. Sala	4 C. P. D. 239	96
Rex v. Adams	1 Car. & M. 299	204, 208
—— v. Batt	6 C. & P. 329	208
—— v. Burdett	4 B. & A. 95	437
—— v. Chambers	4 Camp. 379, at p. 378	204
—— v. Flintan	1 B. & Ad. 227	89, 90
—— v. Howell	9 Car. & P. 437	204, 208
—— v. Malland	2 Str. 828	49
—— v. Pateman	Russ. & Ry. 455	79
—— v. Peltier	State Trials, vol. xxviii. p. 530	249
—— v. Patteson	4 B. & Ad. 9	514, 515
—— v. Price	5 Car. & P. 510	204, 208
—— v. Thomas	4 Car. & P. 237	204, 208
—— v. Vint	St. Tr. xxvii. 627	249
—— v. West Riding of Yorkshire	2 East 353	198
Richardson v. Saunders	6 Q. B. D. 313	389, 390, 392, 393, 394
Ridgway v. Wharton	6 H. L. C. 238	127, 128
Rivers (Lord) v. Adams	3 Ex. D. 361	109, 110
Robbins v. Fennell	11 Q. B. 248	155, 158, 159, 377
———— v. Heath	11 Q. B. 257	155, 158, 159
Robinson v. Briggs	Law Rep. 6 Ex. 1	518
Rogers v. Kingston upon Hull Docks Company	34 L. J. (Ch.) 165	324
Rusby v. Newsom	Law Rep. 10 Ex. 322	138, 141, 143
Ryall v. Rowles	2 W. & T. 5th ed. 770, 771	379
Rylands v. Fletcher	Law Rep. 3 H. L. 300	423

S.

Saffery, Ex parte, Bremner In re	16 Ch. D. 668	518
St. Leonard's, Shoreditch v. Franklin	3 C. P. D. 377	468
St. Thomas's Hospital v. Stratton	Law Rep. 7 E. & I. App. 477	229
Sandersan v. Symons	1 B. & B. 426	271
Saratoga The	Lush Adm. 318	135
Saunders v. South Eastern Railway Co.	5 Q. B. D. 456	34
Schloss v. Heriot	14 C. B. (N.S.) 59	129
Schmaling v. Thomlinson	6 Taunt. 147	278
Schmidt v. Royal Mail Steamship Company	45 L. J. (Q. B.) 646	66
Seabury v. Hungerford	2 Hill (N.Y.) 80	638
Serjeant v. Dale	2 Q. B. D. 558	283
Sester v. Foxcroft	1 W. & T. 5th ed. 828	175
Shackell v. West	29 L. J. (M.C.) 45	35
Shelley's Case	1 Rep. 93 b	152
Shepherd v. Hills	11 Ex. 55	469
Shinler v. Roberts	B. N. P. 197	467

		PAGE
Simpkin *v.* Justices of Birmingham	Law Rep. 7 Q. B. 482	242
Simpson *v.* Crippin	Law Rep. 8 Q. B. 14	96, 97, 100, 101, 102, 104, 105
Sims *v.* Bond	5 B. & Ad. 389	378
Smeed *v.* Ford	1 E. & E. 602; 28 L. J. (Q. B.) 178	592
Smith *v.* Accident Insurance Company	Law Rep. 5 Ex. 303	218
—— *v.* Cowell	6 Q. B. D. 75	642
—— *v.* Marrable	11 M. & W. 5, at p. 9; 12 L. J. (Ex.) 223	603, 604, 610
—— *v.* Marsack	6 C. B. 486	638, 639, 640
Smyth *v.* North	Law Rep. 7 Ex. 242	525
Sneesby *v.* Lancashire and Yorkshire Railway Company	1 Q. B. D. 42	592
Somerset (Duke of) *v.* Fogwell	5 B. & C. 875	109
Sotheron *v.* Scott	6 Q. B. D. 518	261, 265, 266, 268
South Eastern Railway Company *v.* Railway Commissioners	6 Q. B. D. 586	184, 186, 187
Spence *v.* Union Marine Insurance Company	Law Rep. 3 C. P. 427, 437	358
Spencer *v.* Jack	11 L. T. (N.S.) 242	307
Stacey *v.* Lintell	4 Q. B. D. 291	261, 264, 265, 267, 268
Stapleton *v.* Haymen	2 H. & C. 918	162, 163
Steele *v.* McKinlay	5 App. Cas. 754	638, 639, 640
Stephens *v.* Badcock	3 B. & Ad. 354	377
Stoessiger *v.* South Eastern Railway Company	3 E. & B. 549	79
Stokes *v.* Cox	1 H. & N. 320	448
Sully *v.* Attorney-General	5 H. & N. 711	15, 16, 17
Sully's Case	4 H. & N. 769, and in error 5 H. & N. 711; 29 L. J. (Ex.) 464	566
Sutherland *v.* Pratt	11 M. & W. 296	457
Swain *v.* Morland	1 B. & B. 270	152
Swire *v.* Bell	5 T. R. 371	518
Symes *v.* Hughes	Law Rep. 9 Eq. 475	551

T.

Taylor *v.* Batten	4 Q. B. D. 85	401, 403, 409, 410, 411, 412
—— *v.* Bowers	1 Q. B. D. 291	551
—— *v.* Caldwell	3 B. & S. 826; 32 L. J. (Q. B.) 164	602
—— *v.* Chester	Law Rep. 4 Q. B. 309	551
—— *v.* Gillott	Law Rep. 20 Eq. 682	425, 426, 427, 428
—— *v.* Goodwin	4 Q. B. D. 228	315, 318
—— *v.* Plumer	3 M. & S. 562	353, 356, 377
Tenterden *v.* Guardians of St. Mary, Islington	47 L. J. (M.C.) 81	386
Thomas *v.* Alsop	Law Rep. 5 Q. B. 151	90
Thompson *v.* Giles	2 B. & C. 422	356
Thorn *v.* Mayor, &c., of London	Law Rep. 10 Ex. 112, at p. 123	600
Todd, Ex parte	3 Q. B. D. 407	239, 240, 241, 242, 243
Toland *v.* Murray	18 Johnson (New York, U. S.) 24	378

		PAGE
Tomlinson *v.* Bullock	4 Q. B. D. 230	152
Trench *v.* Nolan	7 Ir. C. L. Rep. 445	478, 480
Turnbull *v.* Janson	3 C. P. D. 264	480, 484
Turner *v.* Heyland	4 C. P. D. 432	642
Tyrie *v.* Fletcher	2 Cowp. 666	457

U.

Ungley *v.* Ungley	4 Ch. D. 73	179, 180
Union Bank of London *v.* Lenanton	3 C. P. D. 243	162

V.

Vaughan *v.* Taff Vale Railway Company	5 H. & N. 679	423
Vavasour *v.* Krupp	15 Ch. D. 474	628

W.

Watson *v.* London and Brighton Railway Company	4 C. P. D. 118	34, 35
Werburgh (Overseers of) *v.* Hutchinson	5 Ex. D. 19	226, 230
Westbury-on-Severn *v.* Barrow-in-Furness	3 Ex. D. 88	386
West Stockton Iron Company *v.* Neilson	17 Scottish Law Rep. 719; 7 Court Sess. Cas. 4th Series, p. 1055	440, 441
Westwood *v.* Bell	4 Camp. 349	379
White *v.* Coleman	Freem. 135	109, 117, 124
Whitehead *v.* Bennett	27 L. J. (N.S.) Ch. 474	301
Wigglesworth *v.* Dallison	1 Sm. L. C. 7th ed. 598	441
Wilders *v.* Stevens	15 M. & W. 208	638, 639
Williams *v.* Ellis	5 Q. B. D. 175	315, 318
Wilson *v.* Finch Hatton	2 Ex. D. 336	604, 610
Winspear *v.* Accident Insurance Company	6 Q. B. D. 42	217, 218, 219, 220
Withers *v.* Reynolds	2 B. & Ad. 802	96
Woodgate *v.* Godfrey	5 Ex. D. 24	82, 83, 85, 87, 88
Wright *v.* Hobert	9 Mod. 65	109, 117, 118, 124, 125
——— *v.* Mills	4 H. & N. 491	152, 153

Y.

Yorkshire Insurance Co. *v.* Clayton	6 Q. B. D. 557	139, 141, 146

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

XLIV VICTORIA.

HAMILTON *v.* CHAINE.

MORGAN, Claimant.

1881
March 4.

Bill of Sale—Statement of Consideration—Deduction for Commission on Loan—41 & 42 Vict. c. 31, *s.* 8.

At the execution of a bill of sale expressed to be "in consideration of 700*l.* now in hand paid," and which the grantor covenanted to repay with interest thereon at the rate of 12*l.* 10*s.* per cent. per annum, the grantee, having previously paid 271*l.* for the grantor, handed to her his cheque for 429*l.*, which was immediately cashed, and the proceeds were thus applied: 350*l.* was paid by her directions to a creditor, 21*l.* 5*s.* 6*d.* was paid to a solicitor as costs for preparing the bill of sale, 7*l.* 10*s.* was paid to or retained by the grantee for commission on the loan and expenses in connection therewith in pursuance of a previous arrangement to that effect between the grantor and grantee, and the grantor further gave to the grantee her promissory note for 10*l.* also in respect of commission on the loan and expenses connected therewith. The balance, 50*l.* 4*s.* 6*d.*, was paid to her:—

Held, that the consideration was not truly stated, and the bill of sale was void as against an execution creditor of the grantor.

19 Ch D 101
104
— 421.5
21 Ch D 76
— 546

Affirmed post 49 - C A

Special Case stated on appeal from the county court of Sussex, holden at Brighton.

In an interpleader issue in which George Morgan was claimant,

9

and William Hamilton defendant, the claimant claimed to be entitled, as against the defendant, to furniture seized in execution by William Hamilton the plaintiff, in an action of *Hamilton* v. *Chaine*, under a judgment therein obtained by him against the defendant Chaine. The judge, upon the hearing of the interpleader issue, gave judgment for the defendant.

The claimant claimed the goods under the following circumstances :—

On the 27th of January, 1880, Mrs. Chaine applied to the claimant to advance her money upon the security of certain household furniture and effects.

The furniture and effects had some time previously been assigned by her to a third person under a bill of sale then outstanding to secure 271*l.* then due, and Mrs. Chaine proposed to the claimant that out of a portion of the advance to be made by him to her he should pay off such bill of sale. The claimant assented, and then and there, at Mrs. Chaine's request, gave to the holder of the bill of sale a cheque for 271*l.*, which sum was paid on account of the total advance to be made to Mrs. Chaine.

The claimant subsequently offered to lend Mrs. Chaine 700*l.* in all upon the security of the furniture and effects, which offer Mrs. Chaine accepted. It was arranged that the parties should meet at the office of the claimant's solicitor to complete the transaction on the 31st of January, 1880.

The parties met as agreed on the 31st of January, 1880. There were present besides the claimant and Mrs. Chaine, Mr. Maynard, the solicitor who attested the bill of sale, and a Mrs. Dawson, to whom Mrs. Chaine was indebted in an amount of about 300*l.* A bill of sale of the furniture and effects from Mrs. Chaine to the claimant was produced and executed by Mrs. Chaine. The claimant then handed to Mrs. Chaine his cheque payable to her order for 429*l.*, being the balance of the sum of 700*l.* after deducting the 271*l.* previously paid to the holder of the prior bill of sale. Mrs. Chaine then handed the cheque to one of Mr. Maynard's clerks, with instructions to cash it and bring back the proceeds, which was done.

The cheque was cashed and the money brought back to the office, and applied as follows :—

There was paid—1. To Mrs. Dawson 350*l.*, being the amount due to her from Mrs. Chaine. 2. To Mr. Maynard 21*l.* 5*s.* 6*d.*, or thereabouts, being the amount of his charges in respect of the preparation of the bill of sale and incidental thereto. 3. 7*l.* 10*s.* was paid to or retained by the claimant for commission on the loan and expenses in connection therewith, in pursuance of a previous arrangement to that effect with the claimant, and Mrs. Chaine further gave the claimant her promissory note for 10*l.* also in respect of commission on the loan and expenses connected therewith. The balance of the 700*l.*, amounting to 50*l.* 4*s.* 6*d.*, was paid to Mrs. Chaine.

The bill of sale was put in on behalf of the claimant, and the execution proved. It formed part of the case.

By it the grantor, "in consideration of the sum of 700*l.* now in hand paid," assigned the furniture to the grantee, and she covenanted to pay to him "the sum of 700*l.* with interest thereon after the rate of 12*l.* 10*s.* per cent. per annum."

The judge found as a fact that the handing over of the two cheques 271*l.* and 429*l.* respectively were parts of the same transaction, but gave judgment for the defendant on the grounds that, having regard to the payment or retention by the claimant of the sum of 7*l.* 10*s.* on the settlement as hereinbefore mentioned, the consideration for which the bill of sale was given, was not truly set forth within s. 8 of the Bills of Sale Act, 1878.

The question for the opinion of the Court was whether, upon the above facts, the judgment was right or wrong.

Petheram, Q.C., and *Gore*, for the claimant. The consideration was truly stated. It was 700*l.* The grantor had the benefit of it all. It is immaterial that part was retained in payment for the services of the grantee in making the loan. The 7*l.* 10*s.* was actually due and payable. *Hamlyn* v. *Betteley* (1); *Ex parte Charing Cross Advance and Deposit Bank, In re Parker* (2); *Ex parte Challinor, In re Rogers.* (3)

R. T. Reid, for the defendant. The bill of sale is stated to be "in consideration of 700*l.* now in hand paid." The question is whether the truth is told in the instrument. The cases establish that if the sum alleged to have been paid has been paid to the grantor or applied at his request, the money is paid and the consideration truly stated. But the least deviation from the truth is fatal to the statement of consideration. It was in this case false to state that 700*l.* had been advanced and 12½ per cent. was the rate of interest. Only 692*l.* 10*s.* was advanced, and the deduction of commission made the rate of interest higher, and interest was payable on 700*l.* of which 7*l.* 10*s.* never was advanced at all. No doubt the money to be advanced may be applied to pay off a debt by the grantor to a third person or to the lender, but it must be a real debt and bonâ fide. In *Hamlyn* v. *Betteley* (1) the money was parted with in the interests and at the directions of the grantor. But here the money was kept by the grantee. In *Ex parte National Mercantile Bank, In re Haynes* (2) the Court held only that a collateral agreement need not be set forth. But in *Ex parte Charing Cross Advance and Deposit Bank, In re Parker* (3) where the consideration stated was 120*l.*, of which 90*l.* only was paid and 30*l.* retained by the grantee for interest and expenses, the Court of Appeal held that the consideration was not truly stated. In *Challinor's Case* (4) there was a debt due to the solicitors for preparing the bill of sale.

---

(1) 5 C. P. D. 327. (2) 16 Ch. D. 35.
(3) 16 Ch. D. 260.

Lastly. It is untrue that the money was "in hand paid."

Gore, in reply. In *Credit Company* v. *Pott* (5) the bill of sale stated that the sum for which it was given was "then paid," whereas no money passed, yet the consideration was held to be sufficiently stated. It matters not whether the money is got from a third person for the borrower, or the grantee agrees to advance it from surplus funds of his own in consideration of a commission. Such an arrangement was here made. The commission was earned and was a debt. The whole cheque was handed to the borrower. She might have kept it. The transaction was bonâ fide.

GROVE, J. I am of opinion that the county court judge was

(1) 5 C. P. D. 327.
(2) 15 Ch. D. 42.
(3) 16 Ch. D. 35.
(4) 16 Ch. D. 260.
(5) 6 Q. B. D. 295.

right. The sum in question is small, but the same principle would apply to a large sum, and, as I read the case, the sum is not quite so small as the county court judge considers it. The agreement was that 700*l.* should be advanced in consideration of the property granted by the bill of sale, and further the grantor covenanted with the grantee that she the grantor would duly pay the said sum with interest thereon, that is on 700*l.* at the rate of 12*l.* 10*s.* per cent. per annum. The bill of sale is stated therein to be "in consideration of the sum of 700*l.* now in hand paid." The question is, was the consideration truly stated in substance? It is said that the statement of the sum being "now in hand paid" is untrue as part of the sum was paid some days before; "paid in hand" is, however, a term used in deeds, and the money would be in hand of the grantor, so that in substance is truly stated. But on the other point made by Mr. Reid I do not think the 700*l.* was truly paid—for there was a sum for commission, and also 10*l.* kept on the promissory note given by the borrower, so that out of 700*l.* the amount of 17*l.* 10*s.* was kept by or returned to the grantee at the time of the giving of the consideration. Then can it be said that the consideration is truly stated, the statement being that 700*l.* was paid, whereas 17*l.* 10*s.* was returned as I have described? I do not think it can. What is the consideration on either hand? The consideration on the part of the grantee is that he furnishes the grantor with certain money; and for that money the grantor makes over her furniture to him. Those are the two objects bargained for. The object of the Bills of Sale Act is that the real and actual consideration for the transaction should be set forth. I do not think it was set forth in this case. The real and actual consideration here was 682*l.* 10*s.* paid, while 17*l.* 10*s.* remained (partly in money and partly as security for money in the shape of a promissory note) in the hands of the grantee. It is said that the grantee may, with the assent of the grantor, retain part of the money advanced; and that has been decided in several cases: *Hamlyn* v. *Betteley* (1); *Ex parte Charing Cross Advance and Deposit Bank, In re Parker* (2). The deduction in *Ex parte Challinor, In re Rogers* (3) was for an actual pre-existing debt due from the grantor; and so as far as expenses are concerned the deduction in the present case may be legal. But here the rest—we do not know exactly what part but some part—is called commission. If it had been shewn that the grantee had made, for example, a journey to London to get the money, or that something was really due to him for expenses, that would be a debt which might be deducted. But this so-called commission was for doing the very thing which is the consideration itself, viz., making the advance. If commission could be so deducted, any other bonus for a loan could be deducted. I see no difference between that, and, as in the case of *Ex parte Charing Cross Advance and Deposit Bank* (1), interest being paid beforehand, which would only be a bonus to the party making the loan. There might be a fair bargain for interest paid in advance, but, if there be, as it enters into the consideration it should be expressed on the face of the bill of sale. In *Ex parte Charing Cross Bank* (1) the deduction of interest was held to vitiate the bill of sale, and that case is clearly in point. Then it is said that the facts stated shew that this deduction was pre-arranged. I do not read the statement in the case to mean that this 7*l.* 10*s.* was a pre-existing debt, or that the commission had been earned in any way but merely that when the parties were discussing the transaction it was arranged that 7*l.* 10*s.* should be deducted. Reading the words "in pursuance of the previous arrangement to that effect" in their fair and grammatical sense, they mean that the 7*l.* 10*s.* was not a previous distinct debt, but part of the very transaction itself. If we were to hold the consideration of this bill of sale to be truly stated we should let in all the mischief which it was the object of the statute to prevent, viz., bargains by which the consideration stated in bills of sale would be wholly or in part nominal, the money not being really advanced, but a large part being kept back as a bonus for the advance. I think the object of the statute was to avoid fictitious considerations being inserted in bills of sale, and to prevent mere nominal considerations of 5 per cent. being inserted, and to have the real and true consideration set forth.

---

(1) 5 C. P. D. 327. (2) 16 Ch. D. 35. (3) 16 Ch. D. 260.

The last point, as to the interest being payable on the whole sum stated as the consideration, raises the only doubt I have, viz., whether the same fact may not have existed in *Ex parte Challinor.* (1) But here the bill of sale is clear and explicit; the interest shall be paid on the whole 700*l.* The grantee was not, however, entitled to interest on 700*l.*, for he had not advanced 700*l.* He was keeping 17*l.* 10*s.*, and yet was getting interest on that sum which he had in his pocket and might have advanced at interest to somebody else. On these grounds, I am of opinion that the consideration was not truly or properly stated, that the statement of it did not convey to any one reading the bill of sale what the real consideration was, and therefore that the provisions of the statute have not been complied with.

---

(1) 16 Ch. D. 35.

LINDLEY, J. I am of the same opinion. The case is not altogether free from difficulty by reason of the authorities referred to in *Ex parte Challinor.* (1) But we must look to see whether the Act of Parliament is complied with. The requirement of it is that the consideration for which such bill of sale was given shall be set forth. What is the consideration for which a bill of sale is given? I think it is the consideration which reaches directly or indirectly the grantor of the bill of sale. The consideration here is stated to be 700*l.* "now in hand paid" by the lender to the borrower. The sum of 7*l.* 10*s.* was repaid by the borrower to the grantee, and not only that but the borrower gave the grantee a promissory note for 10*l.* for commission and expenses. The actual consideration for the loan moving to the lender was that he got the security given to him; he got 7*l.* 10*s.*, and he got the security of the promissory note. The actual consideration for the bill of sale—that is, the consideration moving from the holder to the borrower—cannot be made more than 692*l.* 10*s.*, and if we take in the promissory note, as I am disposed to do, we get the true consideration, 682*l.* 10*s.* The consideration actually advanced was, at most, 692*l.* 10*s.*, that is not the consideration expressed in the deed, and the interest which is covenanted to be paid by the deed is on the sum of 700*l.*, which was not in fact advanced (although in one sense the money was actually paid by cashing the cheque). What was the 17*l.* 10*s.* for? It is said it was the agreed price for the advance of 700*l.*; that cannot be; it may have been the agreed price for the advance of 692*l.* 10*s.*, but there never was such an advance as 700*l.* The 17*l.* 10*s.* is the price paid for less than 700*l.* So on the construction of the Act, and apart from authority, I think the consideration is not truly stated. I place no reliance on the words, "now in hand paid," for the county court judge treated it as all one transaction. As regards the authorities, the two important ones are *Ex parte Charing Cross Advance and Deposit Bank* (1), where there was a deduction of "interest and expenses," but it was not found in that case that there was any previous arrangement to pay interest and expenses, which is the distinction between that case and this one; and *Ex parte Challinor* (2) where part of the sum was deducted for some of the costs of the transaction itself, and the Court held that they might be fairly treated as part of the consideration moving to the borrower. The question is, which is this case most like? I think it is most like the case of the Charing Cross Bank. Here is a deduction—not for the costs of the transaction itself but—as the premium paid for an advance which is not the advance stated in the bill of sale. I think this case is within the principle of *Ex parte Charing Cross Advance and Deposit Bank* (1), which the Court of Appeal carefully upheld in the later case, and comes to this: if a lender advances money on a bill of sale and deducts some of it, he must state the consideration truly, and the statement of the sum secured by the bill of sale is true if he pays the money to the order of the borrower or retains some of it himself in payment of some services rendered by him, but untrue if he deducts a price for a smaller sum than that alleged as the loan.

---

(1) 16 Ch. D. 260.

Judgment for the defendant.

Solicitors for claimant: *Venn & Woodcock.*
Solicitors for defendant: *Nash & Field.*

J. R.

---

(1) 16 Ch. D. 35.

(2) 16 Ch. D. 260.

Re POOKES ROYLE.

1881
March 14.

Bankruptcy—Trustee—Default in rendering Accounts—Committal for Contempt—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 55—*General Rules,* 126, 178, 179.

The mere fact that a trustee in bankruptcy has within four days after his resignation or removal from office neglected to render the accounts prescribed by General Rule 126 of the Bankruptcy Act, 1869, is not sufficient ground for his committal to prison by the Court of Bankruptcy, as for a contempt. To warrant such committal there must be some evidence that he has after notice from the Court wilfully failed to perform the duties imposed upon him by the rule.

Rule calling on the judge of the county court of Lancashire, the comptroller in bankruptcy, and others, to shew cause why a habeas corpus should not issue ordering them to bring up the body of Pookes Royle, who had been committed to Manchester gaol by an order of the County Court.

It appeared from the affidavits that the applicant had been in 1877 appointed trustee of an estate in bankruptcy, and that in August, 1878, he was committed to prison for twenty-eight days for having failed to transmit to the comptroller the requisite accounts under s. 55 of the Bankruptcy Act, 1869, and rule 247. That subsequently he was removed from or resigned his office as trustee, and on the 27th of January, 1880, the comptroller reported to the County Court that he had failed to render the necessary accounts within the four days prescribed by rule 126. Notice was thereupon given to him by the Court to attend on the 5th of March for the purpose of giving his explanation. Having failed to appear on the day named, an order was made by the Court for his committal to prison as having been guilty of a contempt.

F. O. Crump, shewed cause. The report made by the comptroller to the County Court was under s. 57 of the Bankruptcy Act, 1869, which enables him to report to the Court any failure by the trustee to comply with requisitions by the comptroller, and empowers the Court, after hearing the explanation, if any, of the trustee, to make such order in the premises as it thinks just. Under rule 126, where a trustee shall resign or be removed from his office he shall within four days thereafter render to the registrar, to be filed with the proceedings, an account in writing shewing what he has done while trustee, and shall duly account for all moneys or property of the bankrupt, and if he do not comply with these requisitions within the prescribed time the Court shall enforce obedience thereto. It will be contended that under rules 178 and 179 the application to commit the applicant should have been supported by affidavit and a day fixed for hearing the application upon notice. But the procedure under these rules is inapplicable to the present case. Here there is no one to make affidavit of the contempt; the report of the comptroller is all that is required.

W. Phillimore, in support of the rule, was not heard.

DENMAN, J. I think the applicant must be discharged from custody. What is meant by rule 126 is not quite clear, but in a matter affecting the liberty of the subject we must not put a larger construction on the words than they will fairly bear. That rule provides that where a trustee shall resign or be removed from his office, he shall, within seven days thereafter, render to the registrar, to be filed with the proceedings, an account in writing shewing what he has done while trustee, and shall duly account for all moneys or property of the bankrupt, and that if he do not comply with these requisitions within the prescribed time, the Court shall enforce obedience thereto. The rule does not say that the mere non-compliance with these requisitions is to be sufficient to enable the trustee to be sent to prison on the mere report of the comptroller; and, indeed, the rule cannot be interpreted according to its literal meaning. It first provides that the trustee shall within four days render accounts, and then, that if he do not comply with these requisitions within the prescribed time, the Court shall enforce obedience thereto. Strictly speaking, the Court cannot enforce obedience, for the four days must already have elapsed. The rule may, however, be interpreted to mean that if the Court, after the four days, name a time within which he is to comply with the requisitions, and there is a second default, then the trustee is to be deemed guilty of contempt. Here no such time has been named by the Court, and the applicant seems to have been committed simply because he failed to appear and explain his default. I think some other time ought to have been named and brought to the notice of the trustee, and then, if he had stayed away, as he did in the present case, he might have been committed. He has really been punished for not doing within the four days what he was bound to do.

POLLOCK, B. I am of the same opinion. If the only ground of the objection were that the requirements of rules 178 and 179 had not been followed, I should have thought that there was very little in the objection, for under rule 126 the Court would have had knowledge that the accounts had not been rendered, and no affidavit would have been necessary. I will merely add to what my Brother Denman has said, that it is probable that those who prepared this rule did not think that any one in the position of a trustee would first make default, and then neglect to appear for the purpose of giving the Court any explanation. I think, however, that the rule would enable the Court to enforce obedience in the manner explained by my Brother Denman.

Rule absolute.

Solicitors for applicant: *Brooks, Jenkins, & Co.*
Solicitor for comptroller in bankruptcy: *W. W. Aldridge.*

A. P. S.

1881
March 23.

ERICHSEN, REPRESENTATIVE OF THE LONDON AGENCY OF THE GREAT NORTHERN TELEGRAPH COMPANY OF COPENHAGEN, APPELLANT; LAST, RESPONDENT.

Revenue—Income Tax—Foreign Telegraph Company—Marine Cables—Exercising trade in England—Messages forwarded from England to remote Parts of World—16 & 17 *Vict.* c. 34; 5 & 6 *Vict.* c. 35.

The appellants, a foreign company, domiciled in Copenhagen, had three marine cables in connection with Aberdeen and Newcastle, communicating with the telegraph lines of the Post Office in the United Kingdom. They had also work-rooms with clerks, in London, Newcastle, and Aberdeen. Messages from this country were forwarded over the lines of the Post Office and the cables of the appellants to Denmark and thence by their wires and the wires of foreign governments, to Russia, China, Japan, and India. The total charges paid for transmitting such messages were collected by the Post Office, and after deducting their dues handed to the appellants, who retained the amount due to them for the transmission of messages over their cables and lines, and paid the residue to the various governments and companies respectively entitled to it. No profits were made by the appellants from the transmission of messages over the land lines in the United Kingdom:—

Held, that the appellants must be taken to exercise a trade in the United Kingdom under 16 & 17 Vict. c. 34, s. 2, and that they were chargeable to income-tax on the balance of profits or gains from their receipts in this country from the transmission of messages.

Affirmed on appl 8 QBD 414.

CASE stated under 37 Vict. c. 16, s. 9.

1. The Great Northern Telegraph Company of Copenhagen is a foreign corporation, having its seat at Copenhagen, in Denmark, and resident there.

2. The company has three marine cables in connection with the United Kingdom, one at Peterhead in Scotland, and two at Newbiggin, near Newcastle. These cables are in connection with telegraph lines under the control of her Majesty's Postmaster-General at Aberdeen and Newcastle and, under and in pursuance of different agreements, separate wires from Aberdeen to Newcastle and from Newcastle to London, have been provided by the Post Office for the traffic passing over the company's cables to and from the continent.

3. These separate wires are worked by the company's staff, and the company has work-rooms with a staff of servants, at Aberdeen and Newcastle, and work-rooms in Winchester Street, in the city of London, and the rents of the work-rooms and salaries of the

staff, consisting of about forty clerks and electricians, are paid by the company.

4. Messages sent from this country to, say Japan, pass over (1), the lines of the Post Office in this country; (2), over the said marine cables of the company; (3), over land lines in Denmark, belonging to the Danish Government; (4), cables in the Baltic belonging to the company; (5), land lines in Russia belonging to the Russian Government; (6), cables east and south of Russia, belonging to the company. Similarly messages from this country to various parts of the world pass over the three marine cables of the company, and subsequently over cables and lines belonging to foreign governments or to other companies, or over cables or lines belonging to the company, but having their commencement by attachment to cables or lines not owned by the company.

5. Under the international telegraph convention, to which the British Government has adhered, the total charges from the handing in station in the United Kingdom to the place of destination abroad, are, except as hereinafter stated, collected and received by the Post Office telegraph department, which retains out of such total charges the sums due to it under the agreements in respect of messages sent from the United Kingdom to abroad, and received in the United Kingdom from abroad, and hands over the balance to the company, which, in its turn, retains out of such balance the sum due to the company in respect of the transmissions of messages over the cables and lines of the company, and pays over the residue to the various governments and companies respectively entitled to the same.

6. By special arrangement with the Post Office, the company receives payment direct from a few firms who desire to hand in their messages direct to the company and accounts out of such receipts to the Post Office.

7. The expenses incurred by the company in the transmission of messages over the separate wires in the United Kingdom exceed the earnings received by the company in respect of the same, and no profits are made by the company from the use of the land lines in the United Kingdom.

8. The representative of the appellants appealed against an assessment of 40,000*l.*, for the year 1876, ending 5th April, 1877,

under schedule D of the Income Tax Acts, in respect of the profits of the business alleged to be carried on in the United Kingdom by the agency of the appellants.

9. It was contended for the appellant, that as no profits were derived from the transmission of the messages over the land lines used by the company in the United Kingdom, there were no profits made by the company within the United Kingdom, and in these circumstances, no liability to income-tax attached to the company. It was further contended for the appellant, that if liable at all, the company, through its agent, was only liable to be be assessed in respect of the profits earned by the company in the United Kingdom, from the transmission of messages over the said three marine cables and not farther or otherwise.

10. The respondent (the surveyor of taxes) admitted that the Great Northern Telegraph Company was a foreign company domiciled in Copenhagen, but he contended that as its agency in this country despatched messages to the company's offices in Aberdeen and Newcastle, and thence by its own cables from those places, to Norway, Denmark, and Sweden, and from thence by the company's own wires and the wires of foreign governments, to Russia, China, Japan, and India, and that as the entire charges of transmitting such messages from this country were paid by the senders and were received by the agency in London, the amount so received being 70,000*l.* (per annum on the average of the years 1873, 1874, 1875), the company, through its agent, was chargeable to income-tax on the balance of profits or gains arising from the total sums received in this country from the transmission of messages.

11. The commissioners present taking this view of the case, confirmed the assessment in respect of the entire profits of the agency, calculated on the total sums received by the company in this country, subject to the production of accounts, shewing the total receipts and expenditure in each year.

The question for the opinion of the Court is, whether under the circumstances herein stated, the company, through its agent, is bound to make a return and is chargeable to income-tax, and if yea, upon what principle the annual profits of which the company is bound to make a return, and on which it is chargeable to income-tax, are to be ascertained, or, whether, as was contended for the company, the company is not bound to make a return, and is not chargeable to income-tax.

A. M. Bremner (*Sir H. Giffard, Q.C.*, with him), for the appellant. The company are not liable under 16 & 17 Vict. c. 34, s. 2, to pay income-tax in respect of their receipts in this country. The company are domiciled and resident at Copenhagen, and they are therefore only liable to be taxed in respect of profits from a trade exercised in the United Kingdom. The case, however, finds, as a fact, that from their wires in England they derive no profit whatever—after payment of the amount due to the Post Office they hold the difference as trustees for the different foreign governments and companies who are entitled to share in it; and to assess them in respect of this sum is to assess them for profits which belong to other persons. Secondly, with regard to the use of the wires wholly situate abroad, it is impossible to say that the trade is exercised in England; *Sully* v. *Attorney General* (1), where it was held that a firm established in New York, with a branch office in England, could not be assessed upon the profits of goods bought in England and resold in America. With regard to the main cables which touch this country, the trade is not exercised in England but in Copenhagen.

[WATKIN WILLIAMS, J. The company receive payments and earn money in London. Is not the only question whether the company carry on an independent business in England?]

The company cannot be said to "carry on business" at any other place than at the principal office where their general business is managed, however large their branch offices may be: *Brown* v. *London and North Western Ry. Co.* (2)

Sir H. James, A.G. (*Sir F. Herschell, S.G.*, and *A. V. Dicey*, with him), for the respondent. The question is whether the company exercise the trade of a telegraph company within the United Kingdom under 16 & 17 Vict. c. 34, s. 2, sched. D. It will be observed that they make contracts for the transmission of messages and receive payments in this country, and it is not sought to assess them upon their gross earnings without regard to outgoings, but upon their net profits upon contracts made here.

(1) 5 H. & N. 711; 29 L. J. (Ex.) 464. 6 Jur N S 1016
(2) 4 B. & S. 326; 32 L. J. (Q.B.) 318. 10 Jur NS. 214

1881

ERICHSEN
v.
LAST.

In the case of a shipping firm at Liverpool which collects goods for transmission to different foreign ports, and receives payment for their carriage, it could not be said that the firm was not liable to pay duty on its profits. *Sully* v. *Attorney General* (1) is an authority against the appellant, for Cockburn, C.J., in his judgment observes that a merchant's place of business is where his profits come home to him. In *Sully* v. *Attorney General* (1), a partner of the American firm resided in England, but the profits were earned in America. *Attorney General* v. *Alexander* (2) and *Gilberton* v. *Fergusson* (3) are authorities to shew that a foreign corporation, having its principal place of business abroad, may be assessed in respect of the profits earned by a branch establishment in this country.

Bremner, in reply.

LINDLEY, J. I am of opinion that the company are liable to pay income-tax upon the annual profits which they receive in this country. It appears that the company is a foreign corporation resident in Denmark, and having its principal place of business there, so that in one sense in which the phrase is used it would be held "to carry on its business" abroad. It further appears that the company have three marine cables in connection with this country, and that these cables are brought into communication with telegraph wires belonging to the post-office at Aberdeen and Newcastle, and that by agreement with the Postmaster-General messages are transmitted from the Post Office over the company's cables to Denmark, and from thence by means of other cables to Russia, China, Japan, and India; that the money in respect of these messages is paid to the Post Office, who, after deducting their expenses, account for the balance to the company, and the company in their turn subdivide the profits among the governments or companies who join in the conveyance of the messages. The first question is, does the company receive profits from any trade exercised in the United Kingdom. Now, it has been argued that the company does not carry on business in the United Kingdom, and taking that expression in its popular sense, I am disposed to agree with the proposition, especially having regard to the deci-

---

(1) 5 H. & N. 711; 29 L. J. (Ex.) 464.
6 Jur N S 1018

(2) Law Rep. 10 Ex. 20.

(3) 5 Ex. D. 57.

1881

ERICHSEN *v.* LAST.

sions as to what is the place of business of railway companies. But, assuming that the company do not carry on their business in this country, it does not follow that they do not receive profits from a business carried on in this country, and to assert that they do not appears to me a very singular proposition. I do not think that the cases of *Attorney General* v. *Alexander* (1) and *Gilbertson* v. *Fergusson* (2), to which we have been referred have much bearing upon the matter. The facts in those cases were peculiar. In the former the question was whether the corporation could be said to be "resident" in England under 16 & 17 Vict. c. 34, s. 2, and in the latter whether the corporation could be taxed on money remitted to this country for the payment of dividends. The appellant relied mainly on *Sully* v. *Attorney General* (3), as shewing that the company do not "carry on business" in the United Kingdom. But that was a different case. It was an attempt to make the partner, resident in England, of an American firm liable to pay duty in respect of the whole profits of the firm. Here it is sought to make the company liable on the net profits accruing to them in England. How these profits are to be ascertained is another question which we are not at present called upon to decide.

WATKIN WILLIAMS, J. I am of the same opinion. This company, although not resident in England, nevertheless carry on trade here. They make their contracts and demand and receive payments in respect of them in this country. The ownership of the different cables by which they forward their messages is for the present purpose immaterial, for the only matter for our consideration is whether they carry on business in this country.

MATHEW, J. I am of the same opinion. I will only add that I cannot think that there will be any practical difficulty in ascertaining the net profits actually earned by the appellant.

Judgment for the respondent.

Solicitors for appellant: *Ashurst, Morris, Crisp, & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

A. P. S.

---

(1) Law Rep. 10 Ex. 20.

(2) 5 Ex. D. 57.

(3) 5 H. & N. 711; 29 L. J. (Ex.) 464.

6 Jan a S/10/18

1881
March 25.

IN RE MALTBY.

Criminal Law—India—Inquiry as to Sanity of Accused—Removal to England—Detention in Asylum—14 & 15 *Vict. c.* 81, *s.* 1.

By 14 & 15 Vict. c. 81, s. 1, if any person shall be indicted for or charged with any crime or offence in any court in India, and shall be acquitted of or not be tried for such crime or offence on the ground of his being found to be of unsound mind, he may be removed to England in the manner prescribed by the Act.

A European British subject in India having been arrested for homicide, a district magistrate was informed of it, and went with witnesses to a private house in the presidency, where the accused was detained. On seeing him and receiving medical testimony on oath as to his state of mind, the magistrate deemed him insane and unfit to be tried, and so reported to the Government of the Presidency. The Government made an order under 14 & 15 Vict. c. 81, s. 1, for the removal of the prisoner to England. By virtue of the order he was brought in custody to England, and on his arrival a Royal warrant was issued, under s. 2, for his reception into a lunatic asylum, where he was accordingly kept:—

Held, that the prisoner was charged with a crime in a "court," and "not tried" on the ground of being "found" to be of unsound mind within the meaning of s. 1, and that his detention was lawful.

RULE calling upon the Home Secretary and the superintendent of the lunatic asylum at Moorcroft House, Hillingdon, Middlesex, to shew cause why a writ of habeas corpus should not issue, commanding them to bring up the body of Thomas James Maltby.

It was stated upon affidavit that the applicant, an assistant magistrate in India, while on a journey from Vizianagiam to Chicacole, on the night of the 24th of December, 1879, during a halt at a village to change the bearers of his litter, without any provocation shot dead one villager, wounded another, and fired a third shot at the bearers, being under the delusion that he had been attacked by certain insurgents. He was disarmed by villagers and kept under restraint until Mr. Irvine, the district magistrate, being informed of the homicide, went, out of kindness, to the house where he was detained, and was ready to investigate the charge there. The witnesses also attended, but on seeing the applicant Mr. Irvine found him in such a state of excitement that it was impossible to hold a judicial inquiry, and came to the conclusion that he was insane. After an examination by medical men they made affidavits and reported that he was not fit to take his trial, and that it was absolutely necessary for his health and safe custody that he should be removed to Madras. These facts having been communicated to the Government of India, the Governor in Council made an order, under s. 426 of the Code of Criminal Procedure, directing that the applicant be kept in safe custody in the lunatic asylum, Madras, and sanctioned his removal thereto. He was accordingly removed to Madras, and when there an application on his behalf for his release was made to the High Court at Madras which decided that he was in lawful custody in India, but suggested that it was competent to the Government, under 14 & 15 Vict. c. 81, to order him to be removed to any part of the United Kingdom, there to abide the order of her Majesty.

On the 20th of April, 1880, the following order was made by the Governor:—

"Whereas Thomas James Maltby, a member of the Madras Civil Service, who was charged before the district magistrate of Vizagapatam, with having, on or about the 25th day of December, 1879, at Sattivada, in the district of Vizagapatam, caused the death of Latchim Nayudu by doing an act with the intention of causing the death of the said Latchim Nayudu, and the said Thomas James Maltby was found by the said magistrate, and by the High Court of Judicature at Madras, to be unfit to plead to the said charge by reason of unsoundness of mind; and whereas the said Thomas James Maltby is now in lawful custody in Madras by reason of the premises, the Governor in Council hereby directs, under the provisions of the 14 & 15 Vict. c. 81, that the said Thomas James Maltby shall be removed to London forthwith, and for that purpose shall be put on board the steamer *Stelvio*, in the custody of Henry Stanborough, Esq., who is authorized to keep the said Thomas James Maltby in his custody in London until an order shall be made by her Majesty for the safe custody of the said Thomas James Maltby, in pursuance of the said Act."

"To Henry Stanborough, Esq., Surgeon."

Mr. Maltby, on the 19th of April, 1880, petitioned against his removal, and his petition was forwarded to the Secretary of State for India in Council. Mr. Maltby left Madras in charge of Mr. Stanborough, on the 22nd of April, 1880, and was brought to London.

On the 5th of May, 1880, a warrant under the hand of Sir William Vernon Harcourt, Secretary of State, was issued, whereby, after reciting that by 23 & 24 Vict. c. 75, it was lawful for the Queen, by warrant under her Royal sign manual, to appoint an asylum for criminal lunatics, and the powers of her Majesty's principal secretaries of state to issue such warrants, and that her Majesty had appointed the Broadmoor Criminal Lunatic Asylum to be an asylum for criminal lunatics under the provisions of the Act, and that T. J. Maltby, charged with having caused the death of a native at Sattivada, in the presidency of Madras, British India, having been brought before the High Court of Madras, was found by such Court to be unable to make his defence on account of insanity, and was, under the provisions of the statute 14 & 15 Vict. c. 81, ordered to be removed from India to the United Kingdom, there to abide the order of her Majesty concerning his safe custody, the Secretary of State, in pursuance of the power in him vested by the above recited Act, directed the superintendent of the Broadmoor Criminal Lunatic Asylum, to receive the said T. J. Maltby into it and keep him therein until he should be lawfully removed or discharged. On the 17th of July, on the application of his friends, a Royal warrant was issued to the superintendent of the Broadmoor Asylum, by virtue of the beforementioned Act, directing him to cause the said T. J. Maltby to be removed from the Broadmoor Asylum to a private lunatic asylum at Hillingdon House, there to remain during her Majesty's pleasure. On the 19th of July, 1880, another Royal warrant was issued for the reception of the applicant into the asylum at Hillingdon House.

Sir Henry James, A.G. (*Sir F. Herschell, S.G.*, *Poland*, and *A. L. Smith*, with him), shewed cause. The applicant is legally detained under 14 & 15 Vict. c. 81, s. 1. (1)

First. The applicant being charged with and not "tried" for a crime, the Government of India lawfully ordered his removal to England. The 14 & 15 Vict. c. 81, is to be construed with reference to the Criminal Code of India, 1872. By part 2, ch. 2, s. 5, of the Code, the Court of the magistrate was a criminal court, and the applicant was charged before him. By s. 142 the magistrate, "in any case in which he is competent to try or to commit for trial, may without any complaint take cognizance of any offence which he suspects to have been committed." By s. 423, where the person charged with an offence before a magistrate competent to try the case appears to such magistrate to be of unsound mind and incapable of making a defence, such magistrate shall institute an inquiry, and by s. 424, when, from the evidence given before him there appears sufficient ground for believing that the accused person committed an act which, if he had been of sound mind, would have been an offence triable exclusively by the Court of Session, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act charged, or that he was doing what was wrong or contrary to law, such accused person shall, if he appears sane at the time of inquiry, be sent for trial by the magistrate before the Court of Session. If such accused person is a European British subject, the magistrate shall follow the procedure prescribed in chap. 7.

---

(1) By 14 & 15 Vict. c. 81, s. 1, if any person shall be indicted for or charged with any crime or offence in any Court in India, and shall be acquitted of or not be tried for such crime or offence on the ground of his being

The word "found" in 14 & 15 Vict. c. 81, s. 1, does not necessarily mean "found by a jury," as will be contended for the applicant. Indian procedure differs from English. The Code

---

found to be of unsound mind, and shall, by reason of the premises be lawfully in custody in India, it shall be lawful for the person administering the government of the presidency in which such person shall be so in custody, to order such person to be removed from India to any part of the United Kingdom, there to abide the order of her Majesty concerning his or her safe custody, and to give such directions for enabling such order to be carried into effect as may be deemed fit and proper.

And, by s. 2, upon the arrival of such person in the United Kingdom, it shall be lawful for her Majesty to give such order for the safe custody of such person during her pleasure in such place and in such manner as to her Majesty shall seem fit, in like manner as if such person had been indicted for an offence and found insane, and were thereby subject to 39 & 40 Geo. 3, c. 94, intituled, An Act for the safe Custody of Insane Persons charged with Offences.

contemplated the proceedings under 14 & 15 Vict. c. 81, s. 1. The magistrate can stay proceedings. His decision is a "finding."

Secondly. The warrant of the Governor-General is sufficient to protect the Home Secretary: s. 7 and s. 1. The applicant is lawfully in custody, and may, under s. 2, be detained during her Majesty's pleasure.

Even if there be some irregularity in the procedure, there is inherent power in this Court to refuse a writ of habeas corpus when the applicant is dangerous to the public by reason of lunacy. If the rule is made absolute he must be sent back for trial to India, when he will be acquitted on the ground of insanity, and again sent here to be detained.

Mayne and *Castle*, in support of the rule. The true question is, has the authority given by 14 & 15 Vict. c. 81, been pursued? Sect. 2 refers to 39 & 40 Geo. 3, c. 94, s. 2; the procedure therein prescribed only applied: 1, when a primâ facie case was made out; 2, before a tribunal capable of convicting; 3, where insanity was tried and found by that tribunal. Exactly similar is the procedure in 14 & 15 Vict. c. 81, s. 1. The word "charged" refers to charges before courts martial and magistrates. A British subject can only be tried by a jury for murder in India. The "charge" must be before a Court which can either acquit him or "not try" him on the ground of insanity. But a magistrate could not "try" him. So the defendants read into the section the words, or "not committed for trial." The only Court which would have tried him was the High Court of Madras. If he had come before it his case would have been governed by the Indian No. 10 Act of 1875, s. 120, and then 14 & 15 Vict. c. 81 would apply. That statute applies to no other case than that of a person brought before a Court able to try him, but not doing so on the ground of his insanity. The proceedings of the Supreme Court are governed by s. 33 of its charter, 41 Geo. 3. There must be an investigation of the insanity of the accused by the tribunal before whom he would be tried. "Charge" has a technical meaning in India, and is not mere accusation. "Complaint" is the word used in the Code until a primâ facie case is made out, and then the "charge" is drawn up in writing: see Code of Criminal Procedure, 1872, ss. 140, 141, 190, 197. Even if the words of 14 & 15 Vict. c. 81, alone are looked at, "charge" means an act of accusation, not a complaint. Under s. 142 of the Code, the magistrate must be "competent to try the case." Those words govern ss. 423, 424. The applicant has never been "charged" in any legal sense before a proper Court. All proceedings have been taken behind his back.

Cur. adv. vult.

Denman, J., after stating the facts, said:—This case seems almost entirely to depend upon the true construction of ss. 1 and 2, especially of s. 1, of 14 & 15 Vict. c. 81, which is the foundation of the authority in the defendants to keep Mr. Maltby in custody. Sect. 2 may also throw some light on the first section, and undoubtedly in a certain view may favour the argument against his detention, because it refers to an earlier statute, although that statute, no doubt, was not intended to meet such a state of things as that existing in the present case. Upon referring to that earlier statute—39 & 40 Geo. 3, c. 94—it is certain that it did not give such a power as that said to exist under the present statute, because by 39 & 40 Geo. 3, c. 94, a provision is only made for persons who are indicted, and who upon arraignment appear to be insane, or who upon their trial are found to be insane. That, therefore, does not itself apply to the present case. But to argue that that statute is therefore in favour of the applicant seems rather to beg the question, for the words of 14 & 15 Vict. c. 81, s. 1, are by no means the same as those in 39 & 40 Geo. 3, c. 94, and the later words of s. 2 are only words which treat of dealing with the person who comes within the statute, and they are not words which limit, or explain, or extend, or affect in any way the class of persons to be dealt with. Therefore, I think, though the 39 & 40 Geo. 3, c. 94, applies to the case so far as dealing with the person who has been charged, it does not throw any real light upon the question as to whom 14 & 15 Vict. c. 81 is intended to apply. That turns on the words of s. 1: "That if any person shall have been, or shall hereafter be, indicted for or charged with any crime or offence in any court in India, and shall have been, or shall hereafter be acquitted of or not be tried for such crime or offence on the ground of his being found to be of

1881

IN RE MALTBY.

Denman, J.

unsound mind, and shall by reason of the premises be lawfully in custody in India," he may be sent to England. The question is whether Mr. Maltby was a person who came within that description, and that question entirely depends upon the construction to be put upon the clause. The Act passed in the year 1851, at a time when 39 & 40 Geo. 3, c. 94, was in force, and that Act only applied to those cases in which there had been a trial, and an indictment, and an arraignment, and this statute undoubtedly uses language applicable to other cases. It is not confined to indictment, and says nothing about arraignment; but the words are much larger, and the question is how much larger they are. At first sight I was inclined to think that the true principle of construction here might be that those words, "Indicted for or charged with any crime or offence," should, according to the ordinary principle of construction, be construed, reddendo singula singulis, thus: "Indicted for any crime or charged with any offence," and that they only applied to a Court sitting for the purpose of trial, and not merely for the purpose of investigating and deciding the question whether the accused should be committed for trial or not. It is important to remember that the statute is dealing with persons of unsound mind, and cannot therefore be looked upon as one wholly in the nature of a statute restraining the liberty of the subject; but it is in a sense a remedial statute, dealing with India where a European is, from the heat, in greater danger of ailment of brain than he would be in this country, and the object is the wise and humane one of removing Europeans from the hot climate to their native air; and I do not think we are bound to hold that the words are to be limited to the exact meaning which they would bear if we were dealing with a matter wholly arising in the United Kingdom, the circumstances being so different. Bearing this in mind, and having before us the actual course to be adopted in the case of persons of unsound mind when charged with criminal offences in India, it appears to me that the words of this statute may be, and upon the whole I think they ought to be, construed so as to include this case. The words, "If any person shall have been, or shall hereafter be, indicted for or charged with any crime or offence," may, I think, be read in this sense, viz., "Any person indicted for any crime or any offence, or charged with any crime or any offence"—not reddendo singula singulis—but including the case where a charge of a crime or offence is made; and I think that any person charged with a crime or offence may be dealt with under this clause.

Then arises the question as to what "In any court" means? After looking through the Code in force in India, it seems to me impossible to say that the magistrate here was not sitting as a court. He went to the place where the accused was detained, intending to make this inquiry as a court. He went with the witnesses, intending that they should be examined, and was, I think, sitting as a Court, just as any magistrate in England before the recent statutory provisions as to his sittings would have been a Court when sitting in his own study to inquire into a case and determine whether he should commit an accused person for trial upon a criminal charge. Then, was the applicant a person who was either acquitted of or not tried for a crime or offence upon the ground of his being of unsound mind? There can be no doubt that the ground of his not being sent for trial, or of his case not being inquired into upon the question whether he should be sent for trial, was his supposed unsoundness of mind. Looking at the matter, as it should be looked at, with reference to the country and the probability of the case, he was, I think, "not tried" within the meaning of the statute. He was "not tried" for a crime on the ground of its being supposed, at all events, that he was of unsound mind. An undoubted difficulty arises, which has been strongly urged, that the very meaning of the words, "found to be of unsound mind" contemplate something different from a mere opinion formed by a magistrate, though based upon his own view and upon extremely good evidence of the very person who ought to be examined upon questions of this kind. That difficulty, which at first struck me and seemed insuperable, is perhaps rendered greater by the word "found" being used in 39 & 40 Geo. 3, c. 94, s. 1, where "found" obviously does mean "found by a jury to be of unsound mind." But it cannot be limited here, I think, so far as to render it only applicable to cases where insanity is found by a jury, because, whatever interpretation is put upon the previous words, "Indicted for or charged with any crime or offence," if they are different, which they certainly are, they must apply to those cases in which a magistrate has power to convict a person of an offence, that is to say, such an offence as is punishable by magistrates without calling in a jury at all. Are not the words "On the ground of his being found to be of unsound mind," fairly and legitimately met by the case of a magistrate going to inquire into the question of whether he shall or shall not commit a man for murder, and then, upon the view, and upon the opinion of skilled and respectable witnesses, "finding" in this sense, viz. that it appears to him and on evidence on oath that the man is of unsound mind so that he cannot be sent for trial? It is not hard to suppose that the legislature, when it passed this Act varying the words in 39 & 40 Geo. 3, c. 94, intended to give a very much larger power in a remedial sense for the benefit of persons under such circumstances found unfit to be tried in India, on account of their appearing to be of unsound mind in the opinion of the magistrate, and to give the Governor-General the humane and useful power of sending the person so charged and found to be of unsound mind to England, that he may have the best possible chance of recovery from his illness, and be kept in England during her Majesty's pleasure. No one asserted, with any plausibility, that that pleasure is not usefully exercised for the benefit of the persons in confinement, as well as for the safety of others who might be seriously endangered by hasty and supposed humanity on behalf of the person who fancies he ought to be at large. I think the statute really meets the case. Our attention has been called to the Code. That seems to me to throw very little light on the matter, because we have rather to regard the state of things when this statute passed, and the powers given by it, than to see what are the powers of the Code applicable to India. The argument from the Code has no substantial bearing upon the case, because my view of ss. 423 to 428 of the Code of Procedure is that they give a power perfectly consistent with the statute, and only go to the length of enabling persons who are found lunatics, and perhaps only when so found by a tribunal competent to try them, to be kept in custody and brought up from time to time when it may be suggested that they are fit to take their trial. All these sections are consistent with such power. When a person is lawfully in custody under these sections, the statute gives a further power, if it be for the good of the person, and the Governor-General in his discretion thinks it wise and right, to send the person to England. In the case before us an application was made to the High Court of Madras, which held that the applicant was lawfully in custody in India. That was the extent, so far as I can make it out, of their finding, and they suggesting that 14 & 15 Vict. c. 81, might apply, called the attention of the Governor-General to it, and upon that statute he acted; and although his order, as I think, inaccurately recites that the applicant was found unfit to plead by the judgment of the High Court, still this recital does not vitiate the accurate recital of facts, shewing the case to contain all the elements which, as I have explained, would bring it within 14 & 15 Vict. c. 81. Therefore I come to the conclusion that upon 14 & 15 Vict. c. 81, alone we ought to proceed, and upon it there is a justifiable detention in the way in which, and to the extent to which, it has proceeded hitherto. I should have been sorry if the alternative view had prevailed, because if the writ issued it would be disastrous, and to no one more so than to the subject of this application. Every hope may be entertained that with proper care he may be in a condition in which her Majesty's pleasure may be exercised for his ultimate benefit, whereas, if he were now discharged upon the writ of habeas corpus there would be nothing for it but process in a vicious circle, commencing where it began before in India, and so much agitation and excitement connected with it that in all probability he would arrive in England a second time, and in a far less hopeful condition as regards perfect recovery than he may arrive at if detained, as I think he is at present rightly detained, in Dr. Stillwell's asylum during her Majesty's pleasure.

POLLOCK, B. In my judgment this rule ought not to go, and one of the grounds upon which I arrive at that conclusion renders it unnecessary to refer to any questions of discretion or to the condition in which Mr. Maltby has been placed. The whole foundation of the proceedings here, in my judgment, is the 14 & 15 Vict. c. 81, because although undoubtedly there is ample ground for upholding all the acts done by the ministerial officers through whose hands the matter has hitherto passed, it is clear to my mind that when the case comes before this Court for adjudication upon habeas corpus, we must go back to the inception of that jurisdiction whereby it is asserted that the supposed lunatic was sent from India to England to be here kept in confinement during her Majesty's pleasure. The first section of this Act requires as a foundation for the proceedings that the person who is charged with the crime shall be found to be of unsound mind. Having regard to the circumstances under which this Act was passed it is quite clear that that word "found" not only in no way means that he should be found a lunatic as lunatics are found in civil cases, but further, in my mind, it points to a finding by a magistrate at a much earlier stage than that when a person in this country is indicted for an offence for which he is afterwards to be tried by a judge and jury. The objection most strongly urged by those who moved for this habeas corpus, and the objection entitled, I think, to the greatest consideration, was that the words "indicted for or charged with" ought to be construed thus: that he shall be indicted for a matter for which he must be tried before a judge and jury, or charged with a crime or offence for which he could be tried by a magistrate, and that the Court to find him to be of unsound mind must be a Court that has power to try him. That argument is founded upon the word "charge," but has really, to my mind, no foundation, because the learned counsel was unable to cite to us any technical meaning of the word "charge" as used in the courts in India at the date of the passing of the statute, though he carefully and properly referred to the procedure and practice in England anterior to that date. Only two years ago the meaning of this word underwent much consideration in the Court of Criminal Appeal before a number of judges, and from the judgment of my Brother Hawkins, J., in *Reg.* v. *Hughes* (1), it may be seen that in many cases the word "charge" in no way involves a written information, and that it is sufficient to show that a person is brought before the magistrates somehow or other, and that all that is necessary to give the magistrate jurisdiction is to show that the person being once before him the crime with which the accused is charged is within the jurisdiction of the

---

(1) 4 Q. B. D. 614.

1881

IN RE MALTBY.

Pollock, B.

magistrate. In *Reg.* v. *Shaw* (1) Erle, C.J., said, "In my opinion, if a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking some such step." That appears to be an opinion in which a large number of judges have shared for many years past. So much then for the word "charge." Then it must be remembered that this statute was not passed merely with reference to the earlier statute of Geo. III., or as one of a class of statutes applicable to the procedure in such a case in this country, and we must bear in mind the circumstances which have been fully stated by my Brother Denman, and which I need not further mention, except to say that in my judgment the statute of Geo. III. is referred to in 14 & 15 Vict. c. 81, s. 2, merely as prescribing a mode of dealing with such a lunatic as is mentioned in s. 1, the state of circumstances which should bring a particular lunatic within the category of persons who may be dealt with under the Act of Geo. III., having been indicated by the earlier section of 14 & 15 Vict. c. 81. If the matter stood there I should still have had some doubt, but the penal code of India throws a little light on the question, and we must remember that this is a question of procedure materially affecting the liberty of the subject, and looking at s. 1 of 14 & 15 Vict. c. 81, we find the condition precedent to a person being removed from India is that he should be not only found to be of unsound mind, but be a person who is either acquitted or not tried for a crime or offence upon the ground of being found to be of unsound mind. Therefore when I inquire whether the present lunatic is a person who was not tried for a crime or offence because he was found to be of unsound mind, I must look at what is the present mode of trying or not trying such a person under the existing law in India, remembering that those who passed that law which has all the force of an Act of Parliament had before them previous statutes relating to the subject. Referring to the penal code I find, in the first place, that the magistrate before whom this matter came was holding a criminal court, because by the interpretation clause of the Code "criminal court" means and includes every judge or magistrate. Then, when I ask myself the question whether this person who was brought before him was "not tried" upon the ground of his being "found" to be of unsound mind, I find that by s. 42 a process is provided whereby when a person, charged with an offence before a magistrate competent to try a case, appears to such magistrate to be of unsound mind and incapable of making a defence, such magistrate shall institute an inquiry, but if he is brought before a magistrate who has not jurisdiction to try the case, but whose duty it would be, if a primâ facie case were established before him, merely to send on the prisoner to Sessions, then it is provided by s. 424: "When, from the evidence given before a magistrate, there appears to be sufficient ground for believing that the accused person committed an act which, if he had been of sound mind, would have been an offence triable exclusively by the Court of Session, and that he was at the time when the act was committed by reason of unsoundness of mind incapable of knowing the nature of the act charged, or that he was doing what was wrong or contrary to law, such accused person shall, if he appears to be sane at the time of inquiry, be sent for trial by the magistrate before the Court of Session." Then, "If such accused person is a European British subject the magistrate shall follow the procedure prescribed in chap. 7. If an accused person appears to be insane at the time of inquiry the magistrate shall act in the manner provided in the last preceding section." Is it not therefore, taking this as a matter of procedure and reading these Acts as a series providing for procedure, clear that the magistrate when he stays proceedings under the Penal Code Act of 1872 is putting the prisoner in the position of a person who is "not tried" on the ground of his being found to be of unsound mind. If that is so, what is the duty of the magistrate? His duty is to institute an inquiry to ascertain the fact of such unsoundness of mind. Upon this, and upon another part of the case, two observations were very properly made by Mr. Mayne. In the first place he said, that this was an inquiry to be watched with some caution, because it was behind the back of the man who was the subject of this application, but I do not understand how he gathers from the language here used that it was ever the intention, or could have been the intention of the legislature that there should be a trial in open court, the accused being present himself, hearing the evidence given against him by medical men and others respecting the condition of his mind. I think that was not only not the intention of the Act, or within the language or spirit of it, but that the intention and spirit of the Act were very different, and beyond doubt that an inquiry should be made in the usual manner in which inquiries are made by filing affidavits of skilful persons who have properly examined the accused. It was said, and is worthy of consideration, that in this case the magistrate had not the man charged before him when sitting in the seat of justice. No doubt the course taken by the magistrate in going to the accused was, though humane, somewhat informal. But it frequently happens that a magistrate goes to hear a case at some hospital or house where the accused is, and the place becomes, in one sense, the Court of the magistrate. Here he saw the accused, heard what was said upon the subject, and instituted an inquiry. Therefore I think that in substance the statute was complied with. All was done that was necessary to give jurisdiction to the magistrate to institute the inquiry; the inquiry was properly instituted, and when instituted the magistrate had power upon the information he received to send the accused person to Madras. When he was at Madras the order was made by the governor there within the powers given by 14 & 15 Vict. c. 18, and so the accused was brought over to this country and is now here in custody under the warrant of the Secretary of State. It seems to me that the grounds which have been argued very fairly and clearly against the detention of Mr. Maltby have failed, and that the writ should not issue.

---

(1) 34 L. J. (M.C.) 169, p. 172. 11 Jur NS. 417

Rule discharged.

Solicitors for applicant: *Cobbold & Woolley.*
Solicitor for defendant: *Solicitor to the Treasury.*

J. R.

1881
March 29.

DYSON, APPELLANT; THE LONDON AND NORTH WESTERN RAILWAY COMPANY, RESPONDENTS.

Railway Company—By-law, Validity and Construction of—8 *Vict. c.* 20, *ss.* 103, 109.

By a by-law of a railway company "any person travelling without special permission of some duly authorized servant of the company, in a carriage or by a train of a class superior to that for which his ticket was issued is hereby subject to a penalty not exceeding 40*s*., and shall, in addition, be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started, unless he shews that he had no intention to defraud." The defendant, with the intention of defrauding the company, travelled in a carriage of a superior class to that for which his ticket was issued, and having been charged under the by-law was convicted in a penalty of 10*s*. and costs:—

Held, that the by-law was illegal and void, for assuming that it could be divided after the words "penalty of 40*s*.," and that each part was capable of being enforced apart from the other, the first part was repugnant to 8 Vict. c. 20, s. 103, which makes a fraudulent intention the gist of the offence of travelling without having paid the fare, and that, if taken as a whole and indivisible, it was unreasonable according to *Watson* v. *London and Brighton Ry. Co.* (4 C. P. D. 118), and *Saunders* v. *South Eastern Ry. Co.* (5 Q. B. D. 456):—

Held, further, that the conviction must be quashed, for it was founded upon the by-law, and could not be upheld as disclosing an offence under 8 Vict. c. 20, s. 103.

CASE stated by justices for the West Riding of York under 20 & 21 Vict. c. 43.

The appellant appeared upon an information charging that he did unlawfully and knowingly travel in a carriage of a superior class to that for which his ticket was available, belonging to the London and North Western Railway Company, contrary to the by-laws of the company, and was convicted in the mitigated penalty of 10*s*. and costs.

The information was laid under the 8th by-law of the company, made in pursuance of 8 Vict. c. 20, ss. 108, 109, and duly certified by the Board of Trade. It is as follows:—

"Any person travelling without the special permission of some duly authorized servant of the company in a carriage or by a train of a superior class to that for which his ticket was issued is hereby subject to a penalty not exceeding 40*s*, and shall, in addi-

1881

DYSON
v.
LONDON AND NORTH WESTERN RAILWAY CO.

tion, be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started, unless he shews that he had no intention to defraud."

The appellant is the holder of a second class contract ticket between Huddersfield and Marsden, available at the intermediate stations.

The due publication of the by-laws under 8 Vict. c. 20, s. 110, and of the short particulars of offences and penalties under s. 143 was admitted by the appellant.

It was proved that the appellant on the day in question got into a first class carriage at Longwood, one of the intermediate stations between Huddersfield and Marsden, and there alighted, and left the station without having paid or tendered the difference between the first and second class fares, and the same not having been demanded, the station-master at Marsden not noticing from what class of carriage the appellant alighted, but the necessity for a demand was waived.

It was objected on the part of the appellant that the case of *Bentham* v. *Hoyle* (1) had already decided that the by-law of another company, in the same words as the by-law of the respondent company and made in pursuance of the same Act of Parliament, was ultrà vires, and that the case could not therefore go on.

It was contended by the respondent company that the Court in *Bentham* v. *Hoyle* (1) did not actually decide the by-law to be ultrà vires the company, but that it was so only if it made fraudulent intention immaterial in the case of the penalty, and they further contended that the fraudulent intention was material in the case of the penalty, and that the by-law was therefore good, and further that the appellant had intended to defraud the respondent company in this case.

The justices were of opinion that, looking at the by-law as a whole, its main and primary purpose is to prevent persons from travelling on the railway in fraud of the company without having paid the necessary fare, and that the obligation to pay the additional fare from the station where the train originally started is subsidiary only to such primary purpose, and they found as a fact that the appellant intended to defraud the respondent company, and that the case against him was proved.

---

(1) 3 Q. B. D. 289.

The questions for the opinion of the Court are:

1. Whether or not the construction put upon the by-law by the respondents is the correct one?

2. Whether the appellant was rightly convicted?

Dodd, for the appellant. The conviction was wrong, for the by-law upon which it is founded is illegal and void. The Act 8 Vict. c. 20, s. 103, deals specifically with the offence of travelling in a carriage of a class superior to that for which the ticket is issued, with the fraudulent intention of avoiding payment, and there is no power to make by-laws varying this section. Secondly, assuming that there was power to make such a by-law, it is unreasonable, for it imposes two penalties, one of which is uncertain, the amount depending, not upon the gravity of the offence, but upon the distance of the point where the train first starts. Lastly, the company had no power, under 8 Vict. c. 20, s. 108, to make such a by-law affecting persons travelling in their own carriages, the enactment being intended to apply to other carriages using the railway: *Saunders* v. *South Eastern Ry. Co.* (1), per Cockburn, C.J. The words, "unless he shews that he had no intent to defraud," at the end of the by-law apply to the whole of the clause, and it is not divisible. The objection to the by-law on account of the inequality of the penalty is fully discussed and explained in *Watson* v. *London and Brighton Ry. Co.* (2)

Bosanquet, for the respondents. The conviction is good. The by-law is intended to make a similar provision to that in 8 Vict. c. 20, s. 103. Secondly, if the Court hold the by-law to be bad, the conviction may be supported under s. 103. Railway companies have undoubtedly power, under s. 108, to make by-laws respecting persons travelling in their own carriages. It would be most inconvenient if they had power to make regulations concerning passengers by carriages belonging to other persons, but no such a power with regard to passengers in their own carriages. The power to make by-laws is a general one with regard to persons travelling upon the railway, and s. 103 imposes a penalty for offences by persons travelling in carriages belonging to the company or other companies. As to the by-law itself, it imposes a penalty of 40*s.* for travelling without having paid the proper fare, and also endeavours to create, by contract, a further liability, to be enforced in a civil court. *Watson* v. *London and Brighton Ry. Co.* (1) has decided that this cannot be done, and that railway companies cannot create a civil liability to an arbitrary fare where there has been no agreement to pay it. But the by-law is divisible, and the part relating to the penalty may be taken by itself and upheld as reasonable: *Reg.* v. *Lundie* (2); *Reg.* v. *Saddlers' Company* (3), per Willes, J. Even if the by-law cannot be divided, and it is held that the two penalties which it imposes are to be regarded as one penalty, it is not absolutely necessary that the penalty should be of an unvarying amount: *Brown* v. *Great Eastern Ry. Co.* (4) Lastly, conceding that the by-law is bad, the conviction may be supported as being for the offence described in 8 Vict. c. 20, s. 103: *Shackell* v. *West.* (5) The reference to the by-law in the information is immaterial. The offence charged and proved is punishable under the statute.

---

(1) 5 Q. B. D. 456.

(2) 4 C. P. D. 118.

Dodd, in reply. With regard to the last point, the conviction must follow the information, and the offence described in s. 103 is wholly different from that in the by-law. With regard to the divisibility of the by-law, it cannot possibly be varied unless the words "no intent to defraud" are taken to apply to the whole regulation. Even if it be read in this sense, the objection remains that it dispenses with the obligation to prove the intent to defraud, and imposes an unreasonable penalty.

LINDLEY, J. I am of opinion that this conviction cannot be supported. The information upon which the appellant was convicted, proceeded upon a by-law and not upon the Act of Parliament. The by-law is as follows:—[The learned judge read the by-law.] The first question raised was whether a railway company has any power to make by-laws applicable to persons travelling in their own trains. I think that the sections which give railway companies power to make regulations and by-laws are so worded as to justify them in making by-laws applicable to persons travelling by their own trains. Then comes the question as to the efficiency and validity of the by-law. Taking it in its natural meaning, it appears to me to be divisible into two parts. The first appears to be that any person, travelling without the necessary permission in a carriage or train of a superior class, is subject to a penalty not exceeding 40*s.*, and I cannot without straining the language add the words at the end "unless he shews he had no intention to defraud," to the preceding sentence which imposes a separate, distinct, and additional liability. I take the meaning to be that a man who travels under such circumstances as are here stated, is to be subjected to a penalty of 40*s.*, simply for the offence, and further that, unless he shews that he had no intention to defraud, he is in addition to be liable to pay the fare as mentioned in the second part of the by-law. The consequence of this construction is that, if you take the by-law as one and indivisible, it is a bad by-law. The authorities which have been referred to shew that. But I am disposed to think that it is divisible after the words 40*s.*, that it is in effect two by-laws in one, each perfectly distinct and capable of standing or falling by itself, and we have to consider whether the part relating to the penalty is good or bad. For this purpose we must contrast this part of it with s. 103 of the Railways Clauses Consolidation Act. This section applies to a case like the present, and imposes a penalty of 40*s.*, but under circumstances and under limitations and restrictions which are omitted from the by-law altogether. Sect. 103 is as follows:—" If any person travel in any carriage of the company without having previously paid his fare (which must mean his fare according to the regulations of the railway company), and with intent to avoid payment thereof" —words which are the substance of the offence—then he is to be subject to a penalty of 40*s*. The railway company have enlarged these words in this very material particular, they have struck out the whole gist of the offence, i.e., the words "with intent to avoid payment thereof," and substituted no equivalent words. So that if a man travels without paying his fare, with or without any intention to defraud, he is to pay 40*s.*

---

(1) 4 C. P. D. 118.

(2) 31 L. J. (M.C.) 157. 8 Jur. N.S. 640

(3) 32 L. J. (Q.B.) 345. 9 Jur. N.S. 1081

(4) 2 Q. B. D. 406.

(5) 29 L. J. (M.C.) 45. 6 Jur. N.S. 95

Then looking at the powers to make by-laws in ss. 108, 109, we have that expressed which I suppose would be implied, that the by-laws must be in conformity with the provisions of the general and the special Act. So that the conclusion I come to is that this by-law as a whole is bad, that it is severable, but that the only part which is material to the present purpose is bad, being in direct contravention of s. 103. The cases of *Dearden* v. *Townsend* (1) and *Bentham* v. *Hoyle* (2), entirely support this view.

It has been contended that even if the conviction cannot be supported under the by-law, it can under s. 103 of the Railway Clauses Consolidation Act. But I cannot think so. The appellant has been proceeded against and convicted under a by-law which does not warrant the conviction, and not under s. 103, and so far as I can see it is still open for the company to proceed against him under that section.

MATHEW, J. I am of the same opinion for the reasons given by my Brother Lindley. There is no doubt that the company has the power to make by-laws, and did make this by-law. It is also clear that the directions contained in the statute as to by-laws which the company are entitled to make have not been observed. The by-law appears to have been framed without reference to the statutory power conferred upon the company, for it seems to have been intended to secure to the company more than parliament intended they should have. I think the company should be held to a strict observance of the law in this respect, and the principle that by-laws may be upheld because they are partly good is a dangerous one. They are regulations, the administration of which is entrusted to the officials of railway companies—officials scattered over the whole country—and regulations likely to be enforced without much consideration for those against whom they are directed, whenever it is supposed that there has been an intention to defraud the company. I agree that a by-law may be divisible, and applying the principle to the present case, it appears to me to be fatal to the by-law, for I

(1) Law Rep. 1 Q. B. 10.

(2) 3 Q. B. D. 289.

1881

DYSON v. LONDON AND NORTH WESTERN RAILWAY CO.

think the division is where my Brother Lindley has pointed out. The by-law is, in point of fact, two by-laws put together, each of which is bad, and each of which appears to be in contravention of the general law.

Judgment for the appellant.

Solicitor for appellant: *J. W. Sykes.*
Solicitor for respondents: *R. F. Roberts.*

A. P. S.

March 31.

[IN THE COURT OF APPEAL.]

CLARKE *v.* BRADLAUGH.

Parliament—Oath of Allegiance—Claim to affirm—Parliamentary Oaths Act, 1866 (29 *Vict. c.* 19)—*Promissory Oaths Act,* 1868 (31 *&* 32 *Vict. c.* 72)—*Penalty—Action by Common Informer—Evidence Further Amendment Act,* 1869 (32 *&* 33 *Vict. c.* 68)—*Evidence Amendment Act,* 1870 (33 *&* 34 *Vict. c.* 49).

The defendant was sued under the Parliamentary Oaths Act, 1866, for a penalty for sitting and voting in the House of Commons without having made and subscribed the oath appointed by that Act, as amended by the Promissory Oaths Act, 1868, to be taken by members. Sect. 4 of the Act of 1866 provides that "Quakers and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath" may, instead of taking and subscribing the oath, make an affirmation in the form given by the Act. The defendant pleaded that he was a person who by reason of the Evidence Further Amendment Act, 1869, and the Evidence Amendment Act, 1870, was by law permitted to make a solemn affirmation, instead of taking an oath, because an oath would have no binding effect on his conscience, and that he came within the exemption of the Parliamentary Oaths Act, 1866, and that he had duly made an affirmation in conformity with that Act before sitting and voting. On demurrer:—

Held (by the Court of Appeal, Bramwell, Baggallay, and Lush, L.JJ., affirming the judgment of Mathew, J.), that s. 4 of the Parliamentary Oaths Act, 1866, exempted only persons having a general right to affirm on all occasions on which otherwise they would take an oath, and that the defence was therefore bad, as the Evidence Further Amendment Act, 1869, and the Evidence Amendment Act, 1870, applied only to persons called to give evidence as witnesses.

The plaintiff replied that the defendant was a person who, by want of religious belief, was not entitled by the Parliamentary Oaths Act, 1866, or the Promissory Oaths Act, 1868, to make and subscribe a solemn affirmation. On demurrer:—

Held (by Mathew, J.), that the reply was bad, as the statute contains no proviso that none but persons of religious belief were or could be entitled to the benefit of the exemption in s. 4 from taking the oath.

A penalty incurred under the Parliamentary Oaths Act, 1866, may be recovered by a common informer, per the Court of Appeal (Bramwell, Baggallay, and Lush, L.JJ.) Revd by H of L 8 App Cas 354 HL

Where there are cross appeals on cross demurrers before the Court of Appeal, and the burden of proof lies on the defendant, so that if he fails in his appeal the cross appeal becomes immaterial, the defendant will be entitled to begin.

CROSS-DEMURRERS to a statement of defence, and a reply.

The pleadings, so far as material, were as follows:—

Statement of claim.

3. The defendant, on the 2nd of July, 1880, sat and voted in the House of Commons after the speaker had been chosen, without having made and subscribed the oath appointed to be taken by members of the House of Commons, according to the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868. (1)

The plaintiff claimed 500*l.*

Statement of defence.

---

(1) By the preamble to the Parliamentary Oaths Act, 1866 (29 Vict. c. 19), it is declared to be expedient that one uniform oath should be taken by members of both Houses of Parliament. The 1st section gave a form of oath which was altered by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72). Sect. 3 prescribed the time and manner of taking the oath. By s. 4 "every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath, may, instead of taking and subscribing the oath hereby appointed, make and subscribe a solemn affirmation in the form of the oath hereby appointed, substituting the words 'solemnly, sincerely, and truly declare and affirm,' for the word 'swear,' and omitting the words 'so help me God;' and the making and subscribing such affirmation, with such substitution as aforesaid by a person hereby authorized to make and subscribe the same, shall have the same effect as the making and subscribing by other persons of the oath hereby appointed." By s. 5: "If any member of the House of Peers votes by himself or his proxy in the House of Peers, or sits as a peer during any debate in the said House, without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of 500*l.*, to be recovered by action in one of her Majesty's superior Courts at Westminster; and if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without having made and subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offence, and in addition to such penalty his seat shall be vacated in the same manner as if he were dead."

1. That before the defendant sat and voted in the House of Commons, he made and subscribed a solemn affirmation in the form prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868.

2. Further, as alternative matters of defence, that at the time of the committing of the alleged offence in the statement of claim mentioned, the defendant was a person who, when called to give evidence in any court of justice, would object to take an oath, and upon whose conscience an oath, if taken, would have no binding effect, so as to be entitled and permitted to make a promise or declaration on the presiding judge being satisfied that the taking of an oath would have no binding effect, as aforesaid. Before sitting and voting in the House of Commons the defendant made and subscribed a solemn affirmation in the form prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868, and the same was received by the clerk at the table of the House, as the officer duly appointed and authorized to administer oaths to witnesses and to elected members of the House.

3. The defendant, before taking his seat in the House, was required to take the oath prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868, and on being so required objected to take the same. The House and the clerk at the table of the House being satisfied that the taking of an oath would have no binding effect on the conscience of the defendant, allowed and permitted him to make an affirmation in the form prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868.

4. Before the defendant took his seat in the House he claimed at the table of the House to make an affirmation or declaration, instead of the oath prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868, founding his claim upon the terms of the Act 29 Vict. c. 19, and the Evidence Amendment Acts of 1869 and 1870 (1), and stating that

---

(1) By the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68, s. 4): "If any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no bind-

he had been permitted to affirm in courts of justice by virtue of the Evidence Amendment Acts; and thereupon it was, by the House, referred to a Select Committee to consider and report their opinion whether persons entitled under the provisions of the Evidence Further Amendment Act, 1869, and the Evidence Amendment Act, 1870, to make a solemn declaration instead of an oath in courts of justice, might be permitted to make an affirmation or declaration instead of an oath in the House, in pursuance of the Parliamentary Oaths Act, 1866, and the Promissory Oaths Act, 1868.

5. The Committee duly reported, and their report was in the words and figures following:—

"That in the opinion of this Committee persons entitled under the provisions of the Evidence Amendment Act, 1869, and the Evidence Amendment Act, 1870, to make a solemn declaration instead of an oath in courts of justice, can not be permitted to make an affirmation or declaration instead of an oath in the House of Commons in pursuance of the Acts 29 Vict. c. 19, and 31 & 32 Vict. c. 72."

6. After the making of the report the defendant again presented himself at the table of the House for the purpose of taking the oath prescribed by the Parliamentary Oaths Act, 1866, and the Promissory Oaths Act, 1868, when objection was made to his taking the oath. Thereupon it was by the House referred to a Select Committee to inquire into and consider the facts and circumstances under which the defendant claimed to have the oath administered to him in the House, and also as to the law applic-

---

ing effect on his conscience, make the following promise and declaration: 'I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth;' and any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried, and convicted for perjury as if he had taken an oath."

By the Evidence Amendment Act, 1870 (33 & 34 Vict. c. 49), "The words 'court of justice' and the words 'presiding judge' in s. 4 of the said Evidence Further Amendment Act, 1869, shall be deemed to include any person or persons having by law authority to administer an oath for the taking of evidence."

These Acts do not extend to Scotland.

able to such claim under such circumstances, and as to the right and jurisdiction of the House to refuse to allow the form of the oath to be administered to him, and to report thereon to the House, together with their opinion thereon.

Paragraph 7 set out the report of the Committee on the 16th of June, 1880, the effect of which was to recommend that the defendant should not be allowed to take the oath, but that, as it appeared that if a member should make and subscribe the affirmation in place of taking and subscribing the oath, it would be possible to test by action his legal right to make such an affirmation, the Committee advised that the defendant should not be prevented from making and subscribing the affirmation should he again seek to do so. Paragraph 8 set out a resolution of the House of the 22nd of June, 1880, that the defendant should not be permitted to take the oath or make the affirmation.

10. On the 2nd of July, 1880, it was resolved by the House as follows:—

8 App Cas 368

"That every person returned as a member of this House, who may claim to be a person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath, shall henceforth (notwithstanding so much of the resolution adopted by this House on the 22nd day of June last as relates to affirmation) be permitted without question to make and subscribe a solemn affirmation in the form subscribed by the Promissory Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868, subject to any liability by statute."

12. After the House had so resolved as aforesaid, the defendant again presented himself at the table of the House and claimed to be a person for the time being by law permitted to make a solemn affirmation instead of taking an oath, and thereupon the defendant duly made and subscribed a solemn affirmation in the form prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868.

13. After the passing of the said resolutions, and after the making and subscription by the defendant of a solemn affirmation as hereinbefore mentioned, and not until then the defendant sat and voted in the House of Commons as mentioned in the statement of claim.

Reply. 1. The plaintiff, as to the first paragraph of the statement of defence, admits that the defendant sat and voted in the House of Commons and made and subscribed a solemn affirmation as in the first paragraph of the defendant's statement of defence alleged, and says that he sat and voted as aforesaid subject to any liability by statute for so sitting and voting in the House of Commons, and, further, that the defendant was a person who, by want of religious belief, was not entitled to make and subscribe a solemn affirmation by the Parliamentary Oaths Act of 1866, as altered by the Promissory Oaths Act, 1868, or by any other statute in that behalf.

The plaintiff demurred to the second and following paragraphs of the statement of defence, and the defendant demurred to the first paragraph of the reply.

1881. March 7. *Sir H. Giffard, Q.C.* (*Kydd,* with him), appeared for the plaintiff.

The defendant appeared in person.

Cur. adv. vult.

1881. March 11. MATHEW, J., delivered judgment, after stating the effect of the pleadings and demurrers above set out, as follows: The case for the plaintiff was shortly this. The defendant by the Parliamentary Oaths Act, 1866, was bound to subscribe the oath thereby appointed, and was not entitled to affirm: and the defendant was challenged to point out any later enactment which enabled him to substitute an affirmation for the oath. The defendant at once admitted that the Oaths Act of 1866, would not have entitled him to make an affirmation, but in an argument which in vigour and clearness left nothing to be desired, contended that the legislation relating to oaths which followed the Act of 1866, relieved him from the disability imposed by that statute.

The defendant's contention on this point may be stated thus:—

The Act of 1866, contained in the 4th section an exemption in favour of Quakers and any other persons "for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath." When the Act passed, the defendant was not a person permitted by law to make an affirmation instead of taking an oath, but that privilege was acquired by virtue of the statutes 32 & 33 Vict. c. 68, and 33 & 34 Vict. c. 49. These enactments, it was said, created a new class of persons of whom the defendant was one (viz., persons permitted to affirm because an oath would have no binding effect on the conscience) who were relieved of the obligation to take an oath. It followed that these persons were intended by the legislature to enjoy the exemption in s. 4 of the Act of 1866. In other words, as the defendant contended, the object of the Acts of 1869 and 1870 was to amend the Act of 1866, and to extend the exemption in s. 4 of that statute to the class of persons represented by the defendant: and it was urged that in order to give effect to this supposed intention of parliament the Acts must be read and construed together as if they were one Act.

In order to decide whether this contention of the defendant is well founded in point of law, it becomes necessary to examine the provisions of the Acts of 1869 and 1870, which are respectively entitled the Evidence Further Amendment Act, 1869, and the Evidence Amendment Act, 1870.

In the first place, the statutes contain no express provision that the persons thereby entitled to affirm are also to be entitled to affirm under the Act of 1866; and it seems difficult to understand, if the legislature intended to make a change in the law in an important matter which affected both Houses of Parliament, that this intention should not be expressed in clear and decisive language. There is nothing of this in the statutes; and nothing to shew an intention that they should have any other operation than that described in the Acts themselves. What their object was is well explained in the preamble to the Act of 1869, which is as follows:—

"Whereas the discovery of truth in courts of justice has been signally promoted by the removal of restrictions on the admissibility of witnesses, and it is expedient to amend the law of evidence with the object of still further promoting such discovery."

This being the preamble, the statute proceeds to enact that if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person, if the presiding judge is satisfied that the taking of an oath would have no binding effect upon his conscience, shall make a promise and declaration to tell the truth, and shall be liable, for false evidence, to be tried and convicted for perjury.

It seems to me perfectly clear that the Acts were intended to remove restrictions upon the admissibility of witnesses, with a view of promoting the discovery of the truth, and that they had no other object.

The Acts do not, as was contended by the defendant, create a class of persons for the time being by law permitted to make an affirmation instead of an oath. They only provide that a person may be enabled, or, as it would seem required, to give evidence in a court of justice, when the presiding judge has satisfied himself that the person is one upon whose conscience an oath would have no binding effect.

Again, the Acts have an operation less general than that of the Act of 1866, inasmuch as they do not apply to Scotland; and this result would seem to follow from the attempt to read the Acts together that the representatives of Scotch constituencies, objecting to take an oath for the reasons given by the defendant, would remain subject to a disability from which persons of the same class in other parts of the United Kingdom had been relieved.

I see no grounds whatever for supposing that the legislature intended that the Acts of 1869 and 1870 should qualify the Act of 1866, or that all these statutes should be read together as if they were one Act. It seems to me to be only necessary to place the enactments side by side, to see that they have no such relation to each other as was asserted by the defendant; and that it is impossible to attribute to the legislature the intention to blend the Acts together in one scheme of legislation.

Many difficulties in which the defendant's contention involves him were pointed out in the course of the case, and none of those difficulties seemed to me to have been satisfactorily met. Thus, when the improbability was pointed out that the legislature would attempt to deal "uno ictu" with matter of civil procedure, and matter affecting the constitution, the defendant attempted to shew that the privilege of sitting in either House of Parliament was analogous to what he called the privilege of giving evidence in a court of justice. The argument only served to indicate the difficulty of the defendant's position. No one who was free to choose his words, and had a preference for accuracy of expression, would speak of the discharge of the all-important and most anxious duty of a witness as "a privilege." Again, when it was shewn that no person was permitted to make an affirmation under the Act of 1869, unless there had been an inquiry by the presiding judge which the House of Commons had no means of making, the defendant had no better answer to offer than that the words "presiding judge" in the Act of 1869 must be taken to include, either the House of Commons or any duly appointed clerk of the House of Commons. But to adopt such a mode of construing Acts of Parliament would not be to interpret but to make them. The contention was equally hopeless that the investigation which the judge was bound to make under the Evidence Act, must be taken to have been made by the House of Commons with a result in the defendant's favour, by reason of the order of the 2nd of July, 1880, and of his being permitted to make an affirmation under that order. It seems very clear that the House of Commons declined to pronounce any opinion upon the question whether the defendant was entitled to affirm in lieu of taking the oath.

I have come to the conclusion that the defendant has failed to establish that the effect of the Evidence Acts was to relieve him of the disability imposed by the Parliamentary Oaths Act of 1866, and that the demurrer to the statement of defence must therefore be allowed.

There remains for consideration the question whether the reply is bad on demurrer. The matter of the reply does not appear to be relevant to what turned out to be the defendant's contention. But as I understand the plaintiff suggests by this pleading that the Parliamentary Oaths Act, 1866, must be construed as if it contained a proviso that none but persons of religious belief were or could be entitled to the benefit of the enactment in s. 4 of that statute. I have considered with the attention it deserved, the very earnest argument addressed to me upon this point by Sir Hardinge Giffard, but I am unable to adopt his contention. There seems to be no escape in a court of law from the short answer of the defendant, that the statute contained no such words.

It was said that I ought to hold that the plaintiff's reply set forth what Parliament must have intended. But I should be reluctant to attribute to the legislature the intention to make important rights dependent upon the solution of the question, whether or not a particular individual could be accurately described, as a "person of religious belief." Upon the whole record judgment must be entered for the plaintiff, the defendant being entitled to such costs as may be attributable to the subordinate issue upon which he has been successful.

A. M.

The defendant appealed from the judgment upon the demurrer to the statement of defence, and the plaintiff appealed from the judgment upon the demurrer to the reply.

March 30. *The defendant in person.* Upon these cross-demurrers the defendant is entitled to begin. In the High Court it has been determined that upon the whole record the plaintiff is entitled to judgment, and therefore the burden lies upon the defendant.

Sir H. Giffard, Q.C., for the plaintiff. The plaintiff is entitled to begin upon cross-demurrers: this was the practice in the Court of Queen's Bench before the Supreme Court of Judicature Acts: *Churchward* v. *The Queen.* (1)

[PER CURIAM. The defendant is entitled to begin. It is immaterial to him what becomes of the demurrer to the reply, unless he can shew that the statement of defence is good.]

The defendant in person. This action is brought under the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), s. 5, but the plaintiff sues as a common informer, and that statute does not allow a common informer to recover the penalty. The plaintiff may rely upon *Miller* v. *Salomons* (2), but in that case express power had been given to bring the action by a statute since repealed, 1 Geo. 1, st. 2, c. 13, s. 17. The Crown alone can recover the penalty, no person being empowered to sue for it:

---

(1) Law Rep. 1 Q. B. 173, at p. 183.

(2) 7 Ex. 475; in Ex. Ch. sub. nom. *Salomons* v. *Miller*, 8 Ex. 778. 17 Jur. 463

2 Tomline's Law Dictionary, title Penal Laws, citing Rastell's Entries 433, and 2 Hawkins P. C., c. 26, s. 17. Where penalties are created by statute, they are made recoverable in one of four ways: first, by the Queen alone; secondly, by the Queen and a common informer; thirdly, by a common informer alone; fourthly, by the party aggrieved. In the present case the penalty is not given to the common informer, and therefore the Crown alone can recover it. The Crown cannot grant to a subject the right to sue for a penalty due to itself. This objection was not urged at the hearing before Mathew, J.; but it is now relied upon as an answer to the action.

As to the construction of the Parliamentary Oaths Act, 1866, the words of s. 4 which allow an affirmation to be made are quite general; they enact that any person entitled by law to make a solemn affirmation or declaration may take his seat in the House of Commons after making the affirmation therein prescribed. By the Evidence Further Amendment Act, 1869, s. 4, the defendant is allowed to make an affirmation when he is called as a witness; and it is contended that whenever a person is qualified to make an affirmation as a witness he may make an affirmation in parliament, and thereupon take his seat as a member of the legislature. As to the argument that the Evidence Further Amendment Act, 1869, does not extend to Scotland, it is to be observed that persons residing in Scotland are entitled to the benefit of laws relating to acts done in England, *Reg.* v. *Brackenridge* (1); and hence members for Scotch constituencies may avail themselves of the provisions of the Evidence Further Amendment Act, 1869.

[BRAMWELL, L.J. *Reg.* v. *Brackenridge* (1) is a perfectly plain case, but it does not apply here.]

Sir H. Giffard, Q.C. (*Kydd,* with him), for the plaintiff. The defendant is not a person who is permitted to make an affirmation within the meaning of the Parliamentary Oaths Act, 1866. He may make a declaration under the Evidence Further Amendment Act, 1869, s. 4, but no statute exempts him on all occasions from taking an oath. He is not in the same position as a Quaker, a Moravian, or a Separatist.

The plaintiff can sue as a common informer; if the argument for the defendant were to prevail the penalty could not be recovered by any one.

---

(1) Law Rep. 1 C. C. 133.

Cur. adv. vult.

March 31. The following judgments were delivered:—

BRAMWELL, L.J. The first question in this case arises on the statement of claim, and is whether the plaintiff as a common informer can maintain an action for this penalty claimed by him. It is quite certain that where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it. Authorities have been cited in support of the proposition, but I may as well call attention also to what is said in Com. Dig. Forfeiture (C), namely, "In all cases where a penalty or forfeiture is given by Act of Parliament without saying to whom it shall be, or a limitation for a recompense for the wrong to the party, it belongs to the king." In this case it is not enacted in express words to whom the penalty shall go, and therefore it may be said that unless it can be shewn that by implication the penalty is given to the party who will sue for it, it belongs to the Crown, and the Crown alone can maintain a suit for it. It is argued, however, on the part of the plaintiff, that it is enacted by implication that the penalty shall go to the common informer, and that argument is founded on the words of the Parliamentary Oaths Act, 1866. "He shall for every such offence be subject to a penalty of 500*l.*, to be recovered by action in one of her Majesty's superior Courts at Westminster." It is contended that that clause shews that a common informer may sue for the penalty, because her Majesty does not sue by action. In a note in Com. Dig. Forfeiture (C) to the passage which I have just read, it is said, "Where the statute does not express how it shall be recovered, it must be sued for in the Exchequer;" and for that *Rex.* v. *Malland* (1) is cited. The marginal note of that case is, "Where there is no appropriation of a statute penalty, it is a debt to the Crown and suable for in a Court of Revenue, and not by indictment." It is a very short

---

(1) 2 Str. 828.

BIBL.

note, but I suppose the reporter shewed, by the marginal note, what his appreciation of the decision was, and in the body of the case it is said, "Therefore, the Court held that the 20*s.* per thousand was in the nature of a debt to the Crown, where the unappropriated penalty would go, and was suable for in a court of revenue and not by indictment." On the principle established by these authorities, it is argued that as this penalty may be recovered by action in any one of her Majesty's superior Courts at Westminster, it is not the Crown who is to sue for the penalty, but the common informer including the plaintiff. By that reasoning I own I am convinced, and therefore, I think this action maintainable by the plaintiff. I should have had some doubts if the words had been merely "to be recovered by action," because although "action" commonly means a proceeding commenced by writ, yet I am not sure that it would not be reasonable (if it could be otherwise inferred that the penalty was intended to go to the Crown) to hold that the word "action" is a sort of nomen generale which includes every sort of legal proceeding. The defendant cited to us 31 Eliz. c. 5, s. 5, in which it was said that actions, suits, informations, and indictments by the Crown for a penalty, must be brought within two years: he thus shewed that the word "action" had been used in relation to some proceeding by the Crown for the purpose of recovering a penalty. I am not very much struck by that argument presented to us by the defendant, because we know very well that in drawing Acts of Parliament a great many words are used to comprehend not a usual, but a possible case, which may have escaped the attention of the draftsman, and therefore, it may have been a prudent thing when that Act of Parliament was drawn some 300 years ago, for the draftsman to use a variety of words, "suit, action, information, and indictment." Still if the words had been merely "to be recovered by action," perhaps from the argument afforded by that Act of Parliament, and perhaps from the general consideration which I have mentioned, namely, that an action is a nomen generale, I should have had some doubt whether we should be justified in coming to the conclusion at which we have arrived. I am only expressing my own opinion now, although I know it to be that of my brethren. But in addition to that there are these other words, "in one of her Majesty's superior Courts at Westminster." Now, unless we suppose that it was intended to confer on the Crown a new exceptional and anomalous power, that is to say, of suing for a penalty due to her Majesty in some court other than a court of revenue, it is manifest that the enactment cannot apply to the Crown. I cannot think that it ever was intended that the Crown should be enabled to maintain any proceeding for this debt, for instance, in the Court of Common Pleas, which was in existence at the time this Act passed; and if it was not, it follows that this provision cannot apply to the Crown, and therefore must apply to the common informer, otherwise the result would be that the legislature has created a penalty which is not recoverable by anybody. It was manifestly intended that the penalty should be recovered by somebody, and therefore, one may put that alternative out of the question. It is manifest from what I have said that the action which may be brought in one of the superior Courts at Westminster may be brought by any one of the public, that is to say, by a person called usually a common informer.

The words I have cited apply to penalties incurred by peers, but afterwards, in speaking of the Commons it is said, that a member of the House of Commons who commits a similar offence is to be subject to a "like penalty." I should say that a "like penalty" in ordinary cases would mean one of the same amount, that is to say, a peer should be liable to a penalty of 500*l*., and a commoner should be liable to a penalty of 500*l*. It may be said, if that is so, the result will be that the common informer may sue for the penalty incurred by the peer, but that inasmuch as there is no provision that he may sue for the penalty incurred by the commoner, it must be sued for by the Crown. The defendant admits that this construction cannot prevail. He said that it must be admitted that what is true of the penalty incurred by the peer, is true also of the penalty incurred by the commoner. Of course, we are not bound by that admission. We should not be bound by it if it were made by a counsel learned in the law; we should be bound to give our own judgment on the matter, and, therefore, I do not rely on his admission, but I think he was right in it. It is hardly possible that it was intended that the penalty incurred by peers should go to the common informer, and that the penalty incurred by a commoner should go to the Crown. Therefore, although I admit it somewhat stretches the words to construe "a like penalty," as I am about to do, I think the words in the statute "a like penalty" mean a penalty with the same incidents and conditions attached to it as are attached to the penalty incurred by the peer. It seems to me therefore, that the penalty incurred by a member of the House of Commons sitting and voting without having been duly sworn under the Parliamentary Oaths Act, 1866, is a penalty which may be sued for by a common informer, but I have not a confident opinion about this question. I think a great deal may be said in support of such doubts as I have indicated in the course of the observations which I have had to make.

I come to the other point, and as to that I think it is about as plain a case as ever came before a court of justice. I think it perfectly plain that the defendant was not entitled to affirm or to declare by reason of the Evidence Further Amendment Act, 1869. We ought not to accept the admission of Sir Hardinge Giffard unless we agreed with it, but it is admitted, and I think rightly admitted by him, that the words of the Parliamentary Oaths Act, 1866, s. 4, contemplate the coming into existence of a class of persons other than those particularly mentioned as being then in existence—"Every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath." That obviously means every person for the time being, that is to say, "now or hereafter." Of course, it includes those persons who at the time of the passing of this Act were within that description, that is to say, Moravians and Separatists. The statute contemplates that at some future time another class of persons may be permitted to make a solemn affirmation or declaration instead of taking an oath. Then the question is reduced to this, is the defendant one of a class of persons who are now permitted, or were at the time when this question arose in the House of Commons permitted, to make a solemn affirmation or declaration instead of taking an oath? To my mind he clearly was not. He contends that he was, because by force of the Evidence Further Amendment Act, 1869, s. 4, the defendant is such a person as is described in that enactment. But in my opinion the class of persons who are there described are not persons who are permitted to make a solemn affirmation or declaration instead of taking an oath within the meaning of the Parliamentary Oaths Act, 1866, because it is manifest that this class of persons are those who are, as Quakers are and as others are, permitted, not upon the particular occasion of their being called as witnesses but, on all occasions when they would otherwise have to take an oath, to make a solemn affirmation or declaration. The defendant is not such a person as that. The class of persons to whom he belongs are not persons who are permitted on all occasions whenever they would otherwise have to take an oath, to make a solemn declaration or affirmation. It is only necessary to give one example of it. It is admitted that the class of persons mentioned in s. 4 of the Evidence Further Amendment Act, 1869, would not be permitted to serve on a jury on the condition merely of making a solemn affirmation or declaration instead of taking an oath. One may say generally that in every instance in which an oath would have to be taken, a Quaker is permitted to make a solemn declaration or affirmation instead of taking that Oath, but there are many instances in which the class of persons mentioned in s. 4 of the Evidence Further Amendment Act, 1869, must still take the oath to qualify themselves, and are not permitted to make a declaration. Indeed one may say that the only instance in which they are permitted to make an affirmation or declaration is where they are called upon to give evidence in any court of justice. Therefore it seems to me, and I cannot have a doubt about it, that the Parliamentary Oaths Act, 1866, contemplates the present existence, and the coming into existence of classes of persons who on all occasions are permitted to make a solemn declaration or affirmation instead of taking an oath, and that the Evidence Further Amendment Act, 1869, s. 4, has not created such a class of persons. It seems to me therefore, that the Evidence Further Amendment Act, 1869, did not permit the defendant to make that affirmation in lieu of taking the parliamentary oath, and that the making of this affirmation by him was not equivalent to taking an oath, and that he incurred the penalty.

I will just call attention to that word "permitted." The expression in the Parliamentary Oaths Act, 1866, s. 4, is, "Every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation." It is manifest that enactment applies to Acts of Parliament which may be said to have been passed in ease and exoneration and for the benefit of the persons to whom they apply, and that the permission has been given to them for the relief of their conscience, in order that they might not be in the dilemma of either losing some civil benefit, or violating their conscience in order to obtain it. But s. 4 of the Evidence Further Amendment Act, 1869, does not use any such word as "permit." It says, "such person shall make the following promise and declaration." I know that the defendant urged upon us—and he presented every argument I think that could be presented, at least, I cannot think of any other—that he is permitted to affirm when he is a witness in his own cause. No doubt he is permitted under those circumstances. I should say, if it so happened that he wanted to be a witness in his own cause, he would be permitted to do it, but the main object of the enactment is to ensure that the evidence of such a person shall not be shut out, because he cannot take the oath, and it is manifest that under this section he would be compellable to make a declaration.

I am not struck with the difficulty raised by the plaintiff that it is necessary that it should appear to the satisfaction of the judge that the taking of an oath would have no binding effect on the conscience of the person called to give evidence. But I have felt some difficulty as to this, that the Evidence Further Amendment Act, 1869, does not apply to Scotland. I must say I should have doubted whether that would not of itself have afforded a strong argument for the purpose of shewing that the Act cannot have the interpretation that the defendant contends for, because it seems to me extremely difficult to suppose that the Imperial legislature, which has made a law affecting English and Irish tribunals, but not Scotch tribunals, nevertheless has incidentally passed an enactment, with respect to the English law of evidence and English tribunals, which affects the Imperial legislature, even as to the case of a member representing a Scotch constituency. But as I have said before, it is needless to go into these matters, because I think the other considerations are too plain.

It seems to me that we must pronounce that the statement of defence demurred to is bad, and that for anything in it the plaintiff is entitled to our judgment.

BAGGALLAY, L.J. The substantial question involved in the present appeal is, whether at the time when the defendant presented himself at the table of the House of Commons, and made and subscribed a solemn affirmation in the form prescribed by the Parliamentary Oaths Act, 1866, as modified by the Promissory Oaths Act, 1868, he was a person for the time being permitted by law to make an affirmation instead of taking an oath, within the intent and meaning of the 4th section of the first mentioned Act.

The defendant, in his very able argument, has insisted that, according to the true construction of the Act, the privilege thereby conferred of making and subscribing a parliamentary affirmation instead of taking and subscribing a parliamentary oath, is not limited to such persons as are permitted by law to affirm instead of taking an oath for all purposes as to which, but for such permission, an oath would be required, but is extended to all persons who are permitted to affirm instead of taking an oath, for any one or more, though not for all purposes.

The circumstances of the defendant's case, as put by himself, well illustrate the proposition which he has so affirmed. He has contended that from and after the passing of the Evidence Further Amendment Act, 1869, he was a person permitted by law to make an affirmation, instead of taking an oath, for the one purpose specified in the Act, namely, as a preliminary to giving evidence in a court of justice in a criminal or civil proceeding; though for other purposes, as, for instance, as a preliminary to serving as a juryman, he is not a person permitted by law to affirm instead of taking an oath. If the defendant's contention as to the construction of the 4th section of the Act of 1866 were well founded, there would be great force in his argument that, having become entitled to affirm instead of taking an oath when called upon to give evidence in a court of justice, he was entitled, under the provisions of that section, to make the parliamentary affirmation instead of taking the parliamentary oath.

But I am unable to adopt the construction of the section for which he has contended. It appears to me that, according to the reasonable meaning of the language used, the qualification for making the parliamentary affirmation is a liberty permitted by law for all purposes and upon all occasions for and upon which an oath would otherwise be required to affirm, instead of taking an oath; the section purports to deal with two classes of persons, the first consisting of every person of the persuasion of the people called Quakers, and the second of every other person for the time being by law permitted to make an affirmation instead of taking an oath.

Now the former class were, at the time when the Act passed, permitted to affirm instead of taking an oath for all purposes whatsoever. It appears to me to be the reasonable construction of the section that persons in the second class, who at the time of the passing of the Act were not permitted by law to affirm, but who might for the time being (that is, at some future time) be so permitted, should be permitted to the same extent and for the like purposes, as those in the first class were then permitted, i.e., for all purposes.

The contention of the defendant as to the construction of the section in question being, in my opinion, unfounded, it follows that not being a person authorized by that section to make and subscribe a parliamentary affirmation instead of taking and subscribing a parliamentary oath, he was bound, before sitting and voting in the House of Commons, to take and subscribe the parliamentary oath prescribed by law, and that having sat and voted without taking and subscribing the oath, he has incurred the penalty, to recover which the present action has been brought.

Upon the question whether the present plaintiff was entitled to sue for the penalty, I have nothing to add to what has been said by Bramwell, L.J.; the reasons he has assigned for holding that the present plaintiff is entitled to sue, are to my mind entirely satisfactory.

Various other questions were raised and discussed in the course of the arguments, and it might have been important to consider and dispose of such questions, had the Court been of opinion that the defendant's contention as to the construction of the Act of 1866 was well founded; but in the view which I have taken of that question, it appears to me immaterial to consider the other questions, which have been raised and discussed during the arguments.

LUSH, L.J. The first question to be determined is whether the plaintiff is a person capable of suing for this penalty, and that depends upon the construction of the 5th section of the Parliamentary Oaths Act, 1866. It is admitted, and I think rightly admitted, by the defendant—though I agree that it would not be competent for us to take an admission made by the parties on the construction of the statute unless our own judgment coincided with it—that the words "to be recovered by action" must be imported into the latter clause of the section, because when it says "shall be subject to a like penalty" it means that the penalty shall be recovered in the same way and subject to the same incidents as the penalty which has been by the previous clause inflicted upon an unqualified peer. Therefore the second clause would stand thus, "If any member of the House of Commons votes in the House or sits in the House during any debate without having made and subscribed the oath, he shall be subject to a penalty for every such offence of 500*l.* to be recovered by action in one of her Majesty's superior Courts at Westminster." Now, it does not in terms say who shall have that penalty or who shall sue for it, and if the words had simply been "by action," I am inclined to think at present it would have belonged to the Crown alone, because the word "action" is a generic term and may be used as a general term. It is used in that sense in one of the Acts of Parliament which have been cited before us, in which moreover it was a redundant expression. But it is evident that that is not the sense in which the word "action" is here used. It is used here in the popular sense of a proceeding commenced by writ; because it is to be "in one of her Majesty's superior Courts at Westminster," which means of course in either of them. Now the sovereign could only sue by information in the Court of Exchequer. The sovereign could not have sued in the Court of Queen's Bench or the Court of Common Pleas for this penalty. Therefore, when the statute gives the right of suit by action in either of the Courts, it of necessity to my mind implies that it means an action to be brought by any person capable of suing in any of the three courts which he might select. Therefore, by what is called necessary implication, the right of suit is given to anybody who may sue for the same. In that sense it has exactly the same meaning as it had in the statute which was in force before, but which had in addition to the words "by action in a superior Court" the words "to be sued for by any person who may sue for the same." It has, in my view, exactly the same sense, because the option is given to sue in either of the courts, and that option can only be exercised by a subject and not by her Majesty. I therefore come to the conclusion that the plaintiff is a person capable of suing for this penalty.

That leads me to the material question which was brought here for our decision, namely, whether the defendant is a person within the 4th section who is permitted by law to make a solemn affirmation. Now, in order to construe rightly any statute, one must have before one's mind the state of the law at the time the statute was passed. By several statutes beginning with the early part of the reign of William IV. and ending in the early part of the present reign, members of certain religious bodies whose tenets were known to prohibit the taking of an oath as being contrary to their view of God's word, Quakers for example, were exempted from taking oaths. The first statute passed (3 & 4 Wm. 4, c. 49) enabled Quakers and Moravians to make a solemn affirmation in place of taking an oath in all places and for all purposes whatsoever. That was an immunity given to a particular class of religious persons who were to be exempted throughout the United Kingdom upon all occasions from taking an oath. Under no circumstances after that Act was passed could a Quaker or Moravian be called upon to take an oath. A subsequent statute (3 & 4 Wm. 4, c. 82) extended the same privilege to a class of persons called Separatists; and a still later statute (1 & 2 Vict. c. 77) extended the privilege to persons who had belonged to the society of Quakers or Moravians, but who had seceded from these bodies, still retaining conscientious objection to take an oath. So that at the time this Act was passed four classes of persons were permitted on all occasions and at all times to dispense with an oath and make an affirmation in lieu of it; Quakers, Moravians, Separatists, and those who had been Quakers or Moravians, and who had seceded from them, but still retained their conscientious objection to an oath. Now it must not be forgotten that at that time the Common Law Procedure Act, 1854, was in force, which enacted by s. 20 that "if any person called as a witness or required or desired to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions upon being satisfied of the sincerity of such objection, to permit such person instead of being sworn to make his or her solemn affirmation, which solemn affirmation or declaration shall be of the same force and effect as if such person had taken an oath in the usual form." Therefore, besides the classes of persons to whom I have referred who were privileged to adopt an affirmation in all cases instead of an oath, a person called as a witness in an English court—for the statute was confined to England—no matter what his religious creed might be, if he satisfied the judge that he had a conscientious objection to take an oath, was permitted to give his evidence upon the sanction of an affirmation only. That Act was in force at the time that the Parliamentary Oaths Act, 1866, was passed.

Now if it had been the intention of the legislature to give the same privileges to a member returned to the House of Commons, and who came to the table to be sworn, which that same member would have had if he had been called in the Court of Queen's Bench as a witness, nothing would have been easier than to say so. One would have expected the legislature to adopt the words or some equivalent of the 20th section of the Common Law Procedure Act, 1854, and to say, "If any person returned to the House of Commons shall satisfy the Speaker or the House that he has a conscientious objection to the taking of an oath, the Speaker or House upon being satisfied of the sincerity of the objection, shall permit such person to make a solemn affirmation." That would have been the obvious course which the legislature would have adopted if it had been intended to confer a similar immunity. There would be no need to refer to Quakers, because that would have embraced Quakers and everybody else who had a conscientious objection to take an oath. In that state of the law what the legislature has said is this: "Every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath, may, instead of making and subscribing the oath hereby appointed, make and subscribe a solemn affirmation in the following form." Therefore, clearly on the face of it, the legislature did not mean to adopt for the purposes of parliamentary oaths the provision of the Common Law Procedure Act. According to every canon of interpretation, and according to reason, the "every other person" spoken of here must mean every other person in like position to the Quaker, or why should the Quakers be specified? I feel no doubt whatever that that is the true construction of that section, and that parliament did not intend to allow any person whatsoever who alleged before the House that he had a conscientious objection to take an oath to be permitted to make an affirmation. It is true that at that time the statute under which the defendant claims had not passed. That passed at a later period, and that extended the privilege or immunity far beyond the Common Law Procedure Act, 1854. The provisions of the Common Law Procedure Act, 1854, had, by a subsequent statute (30 & 31 Vict. c. 35, s. 8), been applied to criminal cases, because the Common Law Procedure Act applied only to civil cases. But the Evidence Further Amendment Act, 1869, under which the defendant claims, passed at a still later period, and that gives the right, or privilege, or whatever it may be called, to make an affirmation, not only to persons who have conscientious objections to take an oath, but to persons who avow that an oath has no binding effect on their conscience. The 4th section of the Parliamentary Oaths Act, 1866, is plain in its terms, which, to my mind, entirely exclude such cases, and are intended to include only those classes of persons who have a perfect immunity at all times and at all places from taking any oath whatsoever.

The defendant contended, in his able argument, that there was

1881

CLARKE
v.
BRADLAUGH.

Lush, J.

no need of the 4th section if its object was merely to protect Quakers, Moravians, Separatists, and other persons who were already protected by previous Acts of Parliament. I cannot agree with him in that argument. I am of opinion that if that clause had stood alone it would have excluded Quakers, Moravians, Separatists, and others from the qualification to sit in parliament, because the 3rd section prescribes that the oath "appointed shall in every parliament be solemnly and publicly taken" by every member of the House of Commons. Therefore I think it was necessary to put in the saving clause in the 4th section, in order to preserve the immunities which the legislature had on several occasions for years before granted to the particular classes to whom I have referred. I confess I do not entertain a doubt on either the first point or the second. Having fully considered the bearing of all the statutes, I do not entertain the slightest doubt that the only persons who are permitted in the House of Commons to make an affirmation instead of taking an oath are those classes of persons who by previous Acts of Parliament have been permitted on all occasions and at all times throughout the United Kingdom to make an affirmation instead of taking an oath. My judgment therefore is, that the judgment of the Court below upon the demurrer to the statement of defence is right, and ought to be affirmed. (1)

Appeal dismissed.

Solicitor for plaintiff: *W. G. Stuart.*
Solicitors for defendant: *Lewis & Lewis.*

W. P.

---

(1) April 27. *The defendant in person* applied to the Court of Appeal that the demurrer to the reply might be argued on the ground that at the hearing on the 31st of March judgment had been given only upon the demurrer to the defence, and that the first paragraph to which the reply was pleaded was not demurred to.

THE COURT (Bramwell, Brett, and Cotton, L.JJ.) intimated that the question raised by the first paragraph of the defence had in fact been decided at the hearing, but they directed the demurrer to be argued.

May 2. *Sir H. Giffard, Q.C.* (*Kydd*, with him), for the plaintiff, was not called on.

The defendant in person argued that the first paragraph of the defence was an answer to the action.

THE COURT (Bramwell, Brett, and Cotton, L.JJ.) held that the first paragraph of the defence was no answer to the claim. In order to entitle the

8 App Cas 354

1881
May 16.

[IN THE COURT OF APPEAL.]

WRIGHT *v.* MARWOOD AND OTHERS.
GORDON *v.* MARWOOD AND OTHERS.

Ship—General Average—Deck Cargo.

10QBD 4/
430

The plaintiffs shipped certain cattle as a deck cargo on board the defendants' vessel: during the voyage a storm arose, and owing to stress of weather the master jettisoned the deck cargo by throwing the cattle overboard. The act of jettison was proper and necessary on the part of the master for the safety of the defendants' vessel:—

Held, that the plaintiffs could not recover from the defendants a general average contribution for the loss of the cattle.

Johnson v. *Chapman* (19 C. B. (N.S.) 563; 35 L. J. (C.P.) 23) commented on.

In these actions the same question as to the liability of the defendants was raised, and it is therefore only necessary to state the facts in *Wright* v. *Marwood and Others.*

The plaintiff was a cattle-dealer carrying on business in the Province of Ontario, Canada, and the defendants were the owners of the British steamship *Gladys.* In April, 1878, when the *Gladys* was lying at the Port of New York, the defendants, by their agents, Tucker & Co., entered into a written agreement with the plaintiff, as follows:—

"It is this day mutually agreed between Joshua S. Tucker & Co., agents of the British steamer *Gladys,* now lying in the Port of New York, of the first part, and George Wright, party of the second part, that the party of the first part agrees to let to the party of the second part, the upper deck of the steamer *Gladys,* except so much as is necessary for the proper working of the

---

defendant to sit and vote as a member of the House of Commons without taking the oath prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868, it was necessary that he should be a Quaker, Moravian, Separatist, or other person entitled by law to affirm, and that he should make an affirmation. The defence only averred the performance of one of these two conditions, namely, that the defendant had made an affirmation, therefore it was bad, and judgment must be given for the plaintiff. The reply raised an immaterial issue, and it was unnecessary to pronounce any judgment upon it.

vessel in the master's judgment, for a cargo of cattle to be landed at Portsmouth, England; and the party of the second part agrees to furnish the said vessel not exceeding one hundred (100) head of cattle, or as many as the master decides to take, and to pay the said vessel in advance, on signing bills of lading, the sum of four pounds fifteen shillings (4*l.* 15*s.*) per head. Vessel not responsible for mortality or accident of any nature or kind, and only to supply necessary water for the cattle—the party of the second part furnishing fodder, fittings, and attendants, vessel giving free passage and victual to attendants, not exceeding five, and cabin passage and fare for one superintendent.

"The said party of the second part also agrees to pay the master a gratuity of twenty pounds (20*l.*) Br. stg. on signing bills of lading.

"Cattle to be put on board and landed at risk and expense of party of second part, and to be taken from alongside vessel immediately on arrival at Portsmouth.

"New York, 17th of April, 1878."

In pursuance of the foregoing agreement the plaintiff, on or about the 25th of April, 1878, shipped on board the *Gladys*, at New York, fifty-three head of cattle, with fodder, fittings, and attendants. Forty-seven other cattle were shipped by Gordon, the plaintiff in the action *Gordon* v. *Marwood and Others*, who had agreed with the present plaintiff and the defendants' agents to make up the number of 100 head in the foregoing agreement mentioned. Upon the shipment of the cattle the plaintiff received from the defendants' agents a bill of lading for them signed by the master of the *Gladys*: the bill of lading was substantially in the ordinary form, and provided that the cattle should be delivered in good order and condition, "the dangers of the seas only excepted." It contained in the margin the following memorandum: "Not accountable for mortality or for any accident or injury of any kind or nature whatever." The *Gladys* finally sailed upon her voyage on the 28th of April, but on the 7th of May bad weather set in, and on the 8th the master resolved to jettison the whole of the cattle on board, and he accordingly threw overboard all the cattle that had been shipped. Owing to stress of weather the master was justified in committing the act of jettison for the reasonable safety of the ship. The cattle belonging to the plaintiff and Gordon had been shipped upon the deck according to the contract, but no evidence was given of any custom allowing cattle to be carried as a deck cargo. The plaintiff claimed a contribution from the defendants by way of general average in respect of the loss and jettison of the cattle.

At the trial before Brett, L.J., with a jury, it was admitted that the cattle had been sacrificed for the benefit of the whole adventure, but it was contended by the counsel for the plaintiff that, although the cattle were shipped as a deck cargo, the plaintiff was entitled to a general average contribution from the defendants, and that *Johnson* v. *Chapman* (1) was a binding authority in his favour. Accordingly Brett, L.J., directed the jury to find for the plaintiff in each action, and judgment was directed to be entered for him.

The defendants applied for a rule for a new trial to the Queen's Bench Division, but the judges of that Court (Lush and Manisty, JJ.), were of opinion that the present action was not distinguishable in principle from *Johnson* v. *Chapman* (1), and refused the application.

The Court of Appeal granted a rule for a new trial on the ground that the Lord Justice had misdirected the jury, by telling them that the plaintiffs were legally entitled to claim general average for the jettison of the deck cargo under the contract between the parties.

March 15. *C. Russell, Q.C.*, and *Bigham*, shewed cause. The facts in these two cases being substantially the same, it is only necessary to deal with the first case.

The chief question to be decided is whether the fact, that the cattle were shipped as a deck cargo, prevents the plaintiff from recovering a general average contribution. It was formerly supposed that contribution ought not to be allowed in respect of deck cargoes. The reason why general average cannot ordinarily be claimed in respect of a deck cargo is, that by consent of the owner the goods are placed in a dangerous position, where it will be necessary to sacrifice them in stormy weather before the rest of

(1) 19 C. B. (N.S.) 563; 35 L. J. (C.P.) 23.

the cargo, and where they interfere with the ordinary working of the ship; but this reason cannot be held to extend to voyages between ports in the United Kingdom, to steamers, and to certain kinds of foreign trade: 2 Parsons on Marine Insurance, ch. v. s. 3, pp. 217–220; *Da Costa* v. *Edmunds* (1); *Gould* v. *Oliver.* (2) The former of the two cases just cited was, it must be admitted, an action against underwriters; but the latter was, like the case before the Court, an action for contribution, and they establish that if a particular mode of shipment is legalised by custom, it binds the shipowner to contribute, because he must be taken to have contracted with reference to it. The contract between the parties in the present action contemplated a deck cargo: it must therefore be taken that the shipment of the plaintiff's cattle was lawful, and that he is entitled to recover for a general average contribution: *Johnson* v. *Chapman.* (3) An underwriter is not relieved from responsibility for goods stowed on deck, provided they are placed there according to the usage of the trade, and so as not to impede the navigation: *Milward* v. *Hibbert* (4); and when goods are shipped on board a steamer, the owner ought to be able to recover from the shipowner, if they are jettisoned during the voyage.

It is further contended that if the jettison of a deck cargo gives rise to a claim for general average, at least the interest of the shipowners in the adventure is liable to contribute: it may be difficult to see upon what ground the owners of other cargo can be held responsible; they perhaps never had any notice or knowledge that the plaintiff's cattle were to be shipped upon the deck, and their consent was not necessary to this mode of stowing the cattle. It may be argued for the defendants that although the owners of the cargo under deck may not be liable to contribute, yet the value of their goods must be taken into account in ascertaining the amount which the defendants have to pay; this contention does not seem well founded; the plaintiffs and the defendants were the only parties concerned in the shipment upon deck, and the loss ought to be adjusted between them alone.

---

(1) 4 Camp. 142.

(2) 4 Bing. (N.C.) 134.

(3) 19 C. B. (N.S.) 563, at p. 583; 35 L. J. (C.P.) 23, at p. 28.

(4) 3 Q. B. 120; 2 G. & D. 142; 11 L. J. (Q.B.) 137.

1881

WRIGHT
v
MARWOOD.

It may be objected for the defendants that they are relieved from liability by the words inserted in the margin of the bill of lading; but these words do not cover a claim for general average contribution: *Schmidt* v. *Royal Mail Steamship Co.* (1); *Crooks* v. *Allan.* (2)

[PER CURIAM. The objection hardly seems sustainable.]

Benjamin, Q.C., and *Myburgh*, in support of the rule. The cases cited upon behalf of the plaintiff can only be supported upon the ground, that there was a usage to carry goods on the deck. In *Johnson* v. *Chapman* (3), the real question was whether there was any sacrifice of the part of the cargo in respect of which general average was claimed, in other words, whether the deck cargo had not at the time of jettison already become wreck. In *Milward* v. *Hibbert* (4), although the decision appears to have turned upon the validity of the plea, yet the replication which alleged a custom was also before the Court. *Hurley* v. *Milward* (5) may seem to support the argument for the plaintiff; but it really turned upon a question of pleading. The plaintiff's cattle were lost, not by perils of the seas, but because they were stowed upon deck. In the present case the plaintiff does not rely upon a custom. The authority of the text-writers is against the claim of the plaintiff: 2 Arnould on Marine Insurance, part 3, ch. iv. p. 824; 1 Park on Marine Insurances, ch. vii. pp. 284, 285; 2 Phillips on Insurance, ch. xv. s. 2, par. 1282; 2 Parsons on Marine Insurance, ch. v. s. 3, p. 217. Deck cargoes are not subject of general average according to the laws prevailing in the United States: *The Paragon.* (6) A table of the laws of foreign nations as to general average is given in Lowndes on General Average, 2nd ed. pp. xxviii. xxix., from which it appears that claims for contribution are not allowed when goods on deck are jettisoned: it is important that the law of England should agree with that of other maritime countries as to this branch of jurisprudence.

Cur. adv. vult.

---

(1) 45 L. J. (Q.B.) 646.

(2) 5 Q. B. D. 38.

(3) 19 C. B. (N.S.) 563; 35 L. J. (C.P.) 23.

(4) 3 Q. B. 120; 2 G. & D. 142; 11 L. J. (Q.B.) 137.

(5) Jo. & Ca. (Irish) 224.

(6) Ware (Maine, U.S.) 322.

May 16. The judgment of the Court (Lord Coleridge, C.J., Bramwell and Baggallay, L.JJ.), was delivered by

BRAMWELL, L.J. In these cases the plaintiffs seek to recover against the defendants, ship and freight owners, a contribution as or in the nature of general average in respect of the goods of the plaintiffs jettisoned for the safety of ship and cargo. It is all-important to note that the plaintiffs' goods were deck-cargo, loaded on deck with their assent, on a general ship, not one chartered to them, no doubt at a lower freight than if they had been, as we suppose they might have been, below deck; and that there is no custom alleged bearing upon the case. Now, when such sacrifice is made, as was here, for the common good, as a rule it comes within general average, and must be borne proportionally "by those interested." It is not necessary to say what is the origin or principle of the rule, but, to judge from the way it is claimed in England, it would seem to arise from an implied contract inter se to contribute "by those interested." To this rule there is an exception, viz., deck cargo jettisoned is not entitled to general average contribution. Here, again, the reason or principle is perhaps not important. So is the law. The reason, amongst others, however, assigned is, that deck cargo is a dangerous cargo, certain to be jettisoned before any other, and liable to be unduly jettisoned owing to the facility of doing it when cargo under hatches would not be. So that if we treat general average as matter of implied contract, that ought not to be implied where risk and benefit are not in fair proportion. If, as a matter of positive law, that is the reason which caused the exception, if the goods jettisoned are loaded on deck without the shipper's consent, the shipowner is liable to the goods owner; if with his consent, still other cargo owners will not be. To this exception, however, there are two exceptions, which perhaps resolve themselves into one, viz., that coasting vessels are without the exception, and also those cases where by custom the deck cargo is one customary in the trade, and perhaps also from the port. It is said that there is a further exception, viz., where by agreement with the shipper the cargo is shipped on deck. We are of a different opinion. In the first place the exception is stated by all writers and authorities as extending to the case of deck cargo, whether loaded on deck with or without the owner's consent. It is put in a dilemma; that if without, there is a remedy against shipowner: if with, it is the act of the cargo owner that has made his goods subject to extra risk, so that it is not fair that other cargo should be on a footing with his. No reason can be given for the claim as of general average. It struck me for the moment that there was no difference between a custom and a particular agreement, because customs are incorporated in agreements unless expressly negatived, and are therefore part of them. But to this the obvious answer was given by Mr. Benjamin that, whatever may be the agreement between deck cargo owner and shipowner, the other cargo owners are no parties to it, nor bound to inquire into it, or notice it, as they are bound to take notice of a custom. Then it is said that it is established by authority. We think it is not. We are dealing now with the plaintiffs' claim as one of general average, that is to say, of a right to contribution from ship freight and cargo. The first case relied on is *Milward* v. *Hibbert*. (1) That was an action against underwriters by shipowners to recover what the shipowners had had to pay as a contribution by way of general average for goods jettisoned; and all that was decided was, that a plea saying that it was a deck cargo which was jettisoned was bad, "for not shewing that such loading was improper under the circumstances." It may be observed that the voyage was a coasting voyage, viz., from Waterford to London. The judgment begins (p. 131): "The plea assumes that in no case whatever can the shipowner recover from the underwriter the value of goods loaded on deck." It then discusses a passage in an edition of Lord Tenterden on Shipping, published after his death, shews it varies from what was said in editions in his lifetime, and says that the general rule is not so large as is stated in the later edition. The judgment then proceeds (p. 136): "Now it is obvious there may be other and valid reasons for stowing goods on deck," and finishes thus: "It seems to the Court, for the reasons assigned, that the mere fact of stowing them on deck will not relieve the underwriter from responsibility, inasmuch as they may be placed there according to the usage of trade, and so as not to impede the navigation or in any way increase the risk." It was not averred in the plea that there was no such usage and that the risk was increased, and so the plea was held bad. That case has no bearing on the present: consistently with the plea there might have been, and in fact probably was, the custom. Here we know there was none. The other case relied on by the plaintiffs was *Johnson* v. *Chapman*. (1) That was not a case of general average. The plaintiffs had chartered the defendants' ship, loaded the whole cargo, part of which by the charter was to be, and was, deck cargo, and were held entitled to a contribution from the ship, and with reason. They were not seeking it from other cargo owners, but from the shipowner, who shared the benefit and ought in reason to share the risk of the deck cargo. As Mr. Benjamin pointed out, the counsel for the shipowner never contested the plaintiffs' right if it was a case of sacrifice. The counsel for the plaintiffs indeed did contend for what was not contested: why one cannot see, unless to shew that though deck cargo, it was not wreck but sacrificed. But what is the judgment. "The question is, what is wreck?" (p. 581). Mr. Justice Willes discusses that. Then he says (p. 583): "In this case there was a deck cargo, and the first observation naturally would arise upon its being a deck cargo, and upon the exception with regard to deck cargoes, but that is taken out of the case most effectually by reference to the charterparty. This is an action by the shippers of cargo against the shipowner, and the charterparty contemplates a deck cargo. It is not suggested that there is any statute to make a deck cargo illegal, therefore it seems something more than custom to have deck cargoes. I think it was from Quebec, but it is not necessary to refer to any custom affecting the voyage, because, according to the contract between the parties, there was to be a deck cargo. Then immediately you find that the deck cargo is within the contemplation of the parties, you must deal with it as if shipping a deck cargo was lawful. When you have established that it is a deck cargo lawfully there by the contract of the parties, it becomes subject to the rule of general average." Now certainly that last

---

(1) 3 Q. B. 120.

---

(1) 19 C. B. (N.S.) 563.

1881

WRIGHT
v.
MARWOOD.

sentence gives some colour to the plaintiffs' contention. But the learned judge should be understood as speaking in relation to the subject-matter. It was not a claim for general average as against any other than the shipowner. It was a particular claim against him, and is said to be subject to the "rule" of general average. If Mr. Justice Willes had said that it could have been maintained against other cargo owners, had there been any, it would have been wholly extra judicial, for there were none. But he did not say nor mean to say so. For he says, "The deck cargo was within the contemplation of the parties," which would not be true of other cargo owners. The case, then, was not one of general average. It was as though the plaintiffs were owners of such cargo, and A. owner of other cargo, and A. had agreed to contribute if deck cargo was jettisoned.

In the case before us Mr. Russell felt the difficulty of maintaining the claim as one of general average, viz., one to which ship and other cargo should contribute. "For," said he, "if you hold other cargo not liable to contribute, at all events do not take it into account as diminishing what ship and freight are to contribute." Now, it seems to us, there is positively no reason nor colour of authority for saying other cargo owners would contribute here. They are bound by no agreement they have made.

But then it may be said, and Mr. Russell so contended in the alternative, "let ship and freight contribute in some proportion." It remains to consider whether the claim in this form can be maintained: that is to say, not as one of general average, but of particular right against the shipowner to contribution. It is put in two ways, first, as though there was not other cargo; secondly, as though there was the value, though not liable to contribute, to be taken into account in ascertaining what ship and freight should contribute.

First, let us consider the claim to contribution against ship and freight owner as though there was other cargo, not, however, to be made liable. Now, why should the shipowner be taken to have agreed, that when deck cargo was sacrificed, not for his exclusive benefit, but of his and others, he would bear a proportion of loss as though he alone was benefited? There is no general law or rule of general average applicable to such a case. To maintain the plaintiffs' claim one must imply a particular agreement by the defendants; that if the plaintiffs' cattle were jettisoned for the common good, the defendants would bear a loss proportioned to the value of their ship and freight as compared with the cattle: i.e., ship and freight worth 99,000*l.*, cattle worth 1000*l.*, other cargo 1,000,000*l.*: defendants are to pay ninety-nine per cent. of the loss. Why? We see no reason. In the case of *Johnson* v. *Chapman* (1) the plaintiffs and the defendant got all the benefit from the jettison; not so here. In that case all subject to general average was brought into the account; here it would not be.

Then take the other way the claim is presented, viz., the claim to recover from ship and freight owners such a sum as the plaintiffs would get from them if entitled to general average from all. To take the figures as before. Plaintiffs' cattle 1000*l.*, ship and freight 99,000*l.*, other cargo 1,000,000*l.*, plaintiffs would be entitled to about 90*l.* from defendants. Again we ask why, and for what reason? There cannot be a doubt that the cattle freight was less than it would have been, if they had been, as we have said we suppose they might have been, under deck. Here, again, there is no general law or rule applicable to the case, an agreement must be implied, and we ought not to imply agreements, which parties can expressly make if they please, without some very strong reason for so doing. We see none, nor authority. We prefer to hold that the plaintiffs shipped their cattle as they did, without bargaining for compensation from any one if they were jettisoned, and must bear all the loss themselves, at least without such rights to contribution as they are now claiming. We must add, we think it very undesirable our law should differ from that of other nations, as we think it would if we decided otherwise. There is no authority in our law that we can find to justify the claim in any of the three ways in which it is made, while the law and practice of foreign countries are decidedly to the contrary: Parsons' Maritime Law, 307; Emerigon, c. 12, s. 42. The latter expressly

---

(1) 19 C. B. (N.S.) 563.

1881

WRIGHT v. MARWOOD.

says there is no remedy against the master, if with consent of the merchant the goods are on deck. See also Lowndes on Average and the various codes cited by him, some of which however seem to make no distinction as to deck cargoes. It is to be remembered that the plaintiffs make no complaint of any breach of the contract to carry, no complaint that their goods were improperly jettisoned, or that other goods might have been jettisoned with equal advantage to the ship, the owner of which might have been entitled to general average, or the jettison of which or part of which might have diminished the necessary jettison of the plaintiffs' goods. Their claim is for general average or contribution in the nature of general average. We are of opinion that the judgment must be reversed.

This judgment is not in opposition to any opinion of the learned judge at the trial. He expressed none, the facts were not even stated to him. He was asked to and did give judgment for the plaintiffs, to raise the question which has been discussed here.

Judgment reversed.

Solicitors for plaintiffs: *Chester, Mayhew, Holden, & Browne, for Haigh, Son, & Ayrton, Liverpool.*

Solicitors for defendants: *Johnsons, Upton, Budd & Atkey.*

J. E. H.

1881
May 21.

7 Asp Cas
571

THE MERCANTILE STEAMSHIP COMPANY, LIMITED *v.* TYSER.

Insurance (Marine)—Chartered Freight—Interest, Commencement of—Risks "incident to Steam Navigation"—Option of cancelling Charterparty—Concealment.

The plaintiffs, on the 29th of July, 1875, chartered their ship *G.* for a voyage from New York to Odessa. The freight was agreed "during the voyage aforesaid" at 5500*l.* in cash at Hull, England, on the discharge of the cargo in Odessa. "If the vessel has not arrived at the port of New York on or before the 1st of September, 1875, charterers have option of cancelling this charterparty." The plaintiffs, on the 7th of August, 1875, effected an insurance with the defendant "at and from London to New York while there, and thence to Odessa, viâ Constantinople," on their chartered freight, including, besides the ordinary ones, all risks "incident to steam navigation." The clause in the charterparty giving the option to cancel was not mentioned to the defendant.

The ship started from England on the 7th of August, but owing to the failure of her machinery in the British Channel was obliged to put back for repairs, which occupied so much time that she did not reach New York until after the 1st of September, whereupon the charterers cancelled the charter and the freight was lost:—

Held (by Lord Coleridge, C.J.), that the interest in the chartered freight had commenced at the time when the charter was cancelled, but that the defendant was not liable, for the freight was not lost by any of the perils insured against, but by the exercise of the option to cancel in the charterparty; and, further, that the withholding from the defendant information as to the power to cancel vitiated the policy.

Action on a policy on chartered freight subscribed by the defendant.

At the trial before Lord Coleridge, C.J., at the London sittings at Guildhall, in December, 1880, the case was reserved for further consideration.

January 15, 1881. *R. E. Webster, Q.C.*, and *R. T. Reid*, for the plaintiffs.

C. P. Butt, Q.C., and *Barnes*, for the defendant.

The facts and arguments sufficiently appear in the judgment.

Cur. adv. vult.

May 21. Lord Coleridge, C.J. This was an action on a policy upon chartered freight lost under the following circumstances:—

The charterparty was made at New York on the 29th of July, 1875, and the voyage was described as "a voyage from the port of New York to the port of Odessa." The freight was agreed "during the voyage aforesaid," at "5500*l*. British sterling in cash at Hull, England, on the good and proper discharge of the cargo in the aforesaid port of Odessa;" and then, after some stipulations not material to be noticed, was the following: "If the vessel has not arrived at the port of New York on or before the 1st of September, 1875, charterers have option of cancelling this charterparty."

The policy, which was effected in London on the 7th of August, 1875, was "at and from London to New York, while there and thence to Odessa, viâ Constantinople," and was a valued policy "at on chartered freight," and one of the conditions was, "including all risks incident to steam navigation." The other risks taken were the ordinary ones, including perils of the seas. The clause in the charter containing what has been called the cancelling option, was not mentioned to the defendant, and was not known to him at the time when the policy was effected.

The ship (the *Ganges*) started on her voyage from this country on the 7th of August, and if all had gone well she had four or five days to spare for the performance of it, and might probably have arrived in New York in plenty of time to prevent the possible exercise of the cancelling option. But all did not go well; she broke down from some failure of her machinery in the British Channel; she had to put back for repairs, and the repairs took so long that it was impossible for her to reach New York till long after the 8th of September. Thereupon the charterers exercised their option, the charter was cancelled, and the freight lost. Under these circumstances are the plaintiffs entitled to recover?

It was argued for the defendants that the interest in the chartered freight had not commenced at the time when the charter was cancelled, that the freight was not lost by any of the perils insured against, and that the withholding from the underwriter the information as to the clause in the charterparty containing the cancelling option vitiated the policy.

The first point, I think, must be decided for the plaintiffs. It appears to me that the reasoning of the judges in *Barber* v. *Fleming* (1) is conclusive of this case, and especially the judgment of Sir James Hannen. By the very words of the policy here the voyage, in the course of which the freight was to be earned, had commenced, although not that particular part of it for which freight was to be paid. This, according to *Barber* v. *Fleming* (1), is sufficient; and if the second point was decided for the plaintiffs they would, in my opinion, be entitled to succeed.

That point is whether the freight here was lost by any of the perils insured against, that is by perils of the seas or by any of the risks incident to steam navigation. I think it was not. I think the freight was lost by the exercise of the cancelling option which the charterers had the right to exercise. The breakdown of the ship gave the charterers the opportunity which it was at their pleasure to avail themselves of or to decline. Causa proxima and causa remota give rise, no doubt, to subtle distinctions, to endless questions and decisions. Here it seems to me that it was not the perils of the seas which caused the freight to be lost, though it may be that these perils gave the charterers the right to cancel the charter. Nor if I am right in what caused the loss of freight, will the clause as to the risks of steam navigation help the plaintiffs. These risks, I think, must mean physical risks, so to speak, incident to vessels propelled by steam machinery. The breakdown of an engine, the disabling of a screw, and things of that kind, if they caused the loss of freight, though they happened in calm water and fair weather, would be within the risks against which the underwriters contracted to insure. But if, as I think, they only gave occasion to that which was in itself the proximate cause of loss, they will not avail the plaintiffs. Still less, of course, will they avail if the proximate cause of loss was by no means the necessary result of the matters I have mentioned; and here it might or it might not, almost with equal probability, have been the interest of the charterers to cancel the charter.

I believe this particular provision to be now for the first time the subject of litigation; and the question is therefore somewhat bare of authority. But the principles on which the cases of

---

(1) Law Rep. 5 Q. B. 69.

Hadkinson v. *Robinson* (1) and *Philpott* v. *Swann* (2) were decided appear to me to govern the case before me. In the first case Lord Alvanley held that in an action on a policy on cargo which covered restraint of princes, the loss of cargo, by its being sold for almost nothing at a port short of the port of destination, that port being reported to the master during the voyage as shut against English ships, was not a loss covered by the policy. In giving the judgment of the Court in banco, Lord Alvanley says, "Where underwriters have insured against capture and the restraint of princes, and the captain, learning that if he enter the port of destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the total destruction of the thing insured. If they could, the same principle would have applied in case information had been received at Falmouth that the ship could not safely proceed to Naples." The application of these remarks is obvious. If the boiler had burst before the vessel started, but after the risk attached, whereby she had failed to reach New York, and the charter had been cancelled, the underwriter would equally have been liable.

Philpott v. *Swann* (2) is also much to the purpose. In that case the ship had been prevented from loading a certain portion of cargo by being blown out to sea from the east coast of Africa, and went to St. Helena to repair some damage. From St. Helena she came home without returning to load the deficient portion of her cargo. After argument, Willes, J., delivering the judgment of the Court, held that a policy on cargo did not cover this loss which was caused by not returning to Africa, though that non-return had been caused by perils of the seas, which were insured against. These cases appear to me to warrant the conclusion at which I have arrived. Nor does *Adamson* v. *Newcastle Steamship Freight Insurance Association* (3) in any way conflict with it. In that case Sir Alexander Cockburn and my Brother Manisty held (Lush, J., dissenting) that certain words not the same as the words here cancelled the charterparty, irrespective of the option or wishes of the parties to it. The arguments of my Brother Lush are cer-

(1) 3 B. & P. 388.

(2) 11 C. B. (N.S.) 270.

(3) 4 Q. B. D. 462.

tainly weighty, but the case itself, whether rightly decided or not, was a case upon the construction of other words than those before me, and has really no bearing on the present case. On this point, therefore, I think the defendant entitled to succeed.

I think he is entitled to succeed also on the point as to nondisclosure. The evidence shewed that this provision as to the cancelling option was of comparatively recent introduction into charterparties, that it had come in with the greater prevalence of steamships in the mercantile marine, that it was sometimes inserted and sometimes not in the charters of steamships, and that there was no usage as to its disclosure or nondisclosure. It is plain that it may enormously increase the risk to be run. In this case there were four or five days to spare; but the argument as to its nondisclosure would have been the same if there had been but an hour. I think, therefore, that the fact of this option existing in this charter was a fact which the assured was bound himself to disclose to the underwriter. The case of *Bates* v. *Hewitt* (1) appears to me to be directly in point. On the whole I give judgment for the defendant.

Judgment for the defendant.

Solicitors for plaintiffs: *Plews, Irvine, & Hodges.*
Solicitors for defendant: *Waltons, Bubb, & Walton.*

A. P. S.

---

(1) Law Rep. 2 Q. B. 595.

1881
May 21.

[CROWN CASE RESERVED.]

REG. *v.* HARPER.

Forgery—Inchoate Negotiable Instrument—Bill of Exchange.

H. purchased goods upon the terms that he should give to the vendors his acceptance for the price, indorsed by a solvent third party. The vendors sent to him for such acceptance and indorsement a document in the form of a bill of exchange, for the price, but without any drawer's name thereon. H. returned this document accepted by himself, and with what purported to be an indorsement by a solvent third party. This indorsement was fictitious and had been forged by H. No drawer's name was ever placed upon the document:—

Held, by the Court (Lord Coleridge, C.J., Grove, Hawkins, Lopes, and Stephen, JJ.), that the document was not a bill of exchange, as it bore no drawer's name, and that H. could not be convicted of feloniously forging or feloniously uttering an indorsement on a bill of exchange.

Semble, that he might have been convicted of a common law forgery.

THE following case was stated by Stephen, J.:—

John Harper was convicted of forgery before me at Durham assizes under the following circumstances: Messrs. Watson & Son, of Kilmarnock, having supplied Harper with some machinery, drew a bill upon him for the price, and forwarded it to him for acceptance, unsigned by the drawers. It had been arranged that Harper should procure the indorsement of a solvent person, and should himself accept the bill. Harper returned it accepted by himself, and purporting to be indorsed by one Hunt. It was proved that Hunt's indorsement had been forged by Harper. On getting the bill back, Watson & Son indorsed it and paid it into the bank for collection when due. They did not at any time sign it as drawers.

The following is a copy of the bill of exchange:—

"£22 10*s.* 4*d.* "Kilmarnock, 2 Nov. 1880.

"One month after date pay to me or order the sum of £22 10*s.* 4*d.*, that being for value received in machinery.

"Indorsed,
"John Hunt.
"John Watson & Son.

"Mr. J. Harper,
"Contractor and Builder,
"Rutland Street, Pallion,
"Sunderland."

Across the bill was written "Accepted payable at the Union Bank of London. John Harper."

The indictment contained six counts, which charged Harper :—

1. With feloniously forging a certain indorsement to and on a bill of exchange.

2. With feloniously forging an indorsement to and on a certain paper writing, which said paper writing is in the form of, and purports to be, a bill of exchange, unsigned by any drawer thereof.

3. Feloniously forging a certain indorsement to and on a certain paper writing.

In the 4th, 5th, and 6th counts he was charged with feloniously uttering the documents described in the 1st, 2nd, and 3rd counts.

I was of opinion that all the counts were bad, except the 1st and 4th, but I left the whole matter to the jury.

The jury returned a general verdict of guilty, and I sentenced Harper to be imprisoned with hard labour for nine months, but suspended the execution of the sentence till the decision of this case by the Court for Crown Cases Reserved.

The question for the Court is, whether, under the circumstances stated, Harper was properly convicted of either of the offences charged in the 1st or 4th counts of the indictment, and whether any of the other counts charge a felony?

No counsel appeared upon either side.

LORD COLERIDGE, C.J. The conviction cannot be sustained. The instrument was not a bill of exchange; it was an inchoate bill of exchange. The point requires no authority, though it has the authority of the cases of *McCall* v. *Taylor* (1); *Stoessiger* v. *South Eastern Ry. Co.* (2); *Peto* v. *Reynolds* (3), and *Rex* v. *Pateman.* (4)

STEPHEN, J. Though I entirely agree with the opinion expressed by my Lord, I cannot help observing that the act of the prisoner had all the effect of a forgery punishable under the statute as a felony; the prisoner could, however, have been indicted, and ought to have been indicted, for forgery at common law.

---

(1) 34 L. J. (C.P.) 365. 11 Jur N.S. 579

(2) 3 E. & B. 549. 8 Jur 605

(3) 23 L. J. (Ex.) 98; 9 Ex. 410; 11 Ex. 418. 18 Jur 472

(4) Russ. & Ry. 455.

GROVE, HAWKINS, and LOPES, JJ., concurred.

Conviction quashed.

No solicitors were instructed.

C. D.

May 26.

[IN THE COURT OF APPEAL.]

MARSDEN AND ANOTHER *v.* MEADOWS.
SALMON, CLAIMANT.

Bill of Sale—Registration—Inventory of Goods—Receipt of Sheriff's Officer for Purchase-money of Goods sold under Execution—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31).

The sheriff having seized the goods of the defendant under a writ of fi. fa. issued by C., sold them to the claimant for 65*l.* A deposit of 40*l.* was paid at the time of sale, and 25*l.* on the following day; the sheriff, thereupon, gave to the claimant an inventory of the goods, and a receipt for the price, which were never registered under the Bills of Sale Act, 1878. The defendant remained in possession of the goods, which were afterwards seized by the sheriff under a writ of fi. fa. issued in the present action:—

Held, that the inventory and receipt did not amount to a "bill of sale" within the meaning of the Bills of Sale Act, 1878; and that the claimant was entitled to the goods as against the plaintiffs.

Woodgate v. *Godfrey* (5 Ex. D. 24) followed.

CASE stated pursuant to a judge's order upon the hearing of an interpleader summons, issued at the instance of the sheriff of Essex, and dated the 31st of May, 1879.

On the 6th of January, 1879, the sheriff of Essex was, under a writ of fieri facias issued on a judgment obtained by a Mr. Copland against the defendant, in possession of the whole of the goods, chattels, farm implements, and other effects then being in and upon the premises of the defendant at Billericay, in the county of Essex. Upon that day the claimant agreed to purchase of the sheriff the whole of the goods seized for the sum of 65*l.*, and paid to him on the same day a deposit of 40*l.* on account of the purchase-money, and the sheriff thereupon gave possession of the goods, chattels, farm implements, and other effects to the claimant, who had since paid the rent of the premises, sent his cattle there, and allowed Meadows, the defendant, to occupy the premises and the furniture without payment of any rent, but painting pictures for the claimant, who was a picture dealer. The defendant was lessee of the premises. Upon the following day the claimant sent to the sheriff by post in a letter a cheque for the sum of 25*l.*, making, together with the deposit, the purchase-money agreed on, and thereupon the sheriff sent to the claimant a schedule of the goods bought by him. The schedule was headed, "Inventory of goods at Mr. Meadows' farm, Billericay, Essex;" it comprised a list of the articles bought by the claimant divided into about fifty items, and the price of each item was stated; the total amount was 65*l.* The sheriff sent also a receipt for the purchase-money attached (1) to the schedule in the following words:—

"Received of Mr. J. Salmon the sum of sixty-five pounds, for valuation at Mr. Meadows' farm, Billericay, Essex.

"January 7th, 1879. "John Ballard,
"65*l.* "for Frederick Smee."

The foregoing schedule and receipt were inclosed in the following letter:—

"Chelmsford, January 8th, 1879.

"Dear Sir,—I am in receipt of your favour, for which I am greatly obliged. I enclose schedule and receipt as requested.

"Yours obediently,
"To Mr. J. Salmon. "John Ballard.

"P.S.—I was late home last evening, or should have sent off."

The whole of the said goods, chattels, farm implements, and other effects then being upon the premises of the defendant were, on or about the 31st of May, 1879, seized by the sheriff of Essex under a writ of fieri facias issued on a judgment obtained by the above-named plaintiffs against the above-named defendant; whereupon the claimant then made a claim to the same, as being his absolute and sole property.

At the hearing of the interpleader summons it was admitted that the goods seized by the sheriff were the same as those set out in the schedule, and that there was no question as to the bona fides of the claimant's claim.

---

(1) That is, by a pin: see the judgment of Cotton, L.J., post, p. 84.

The questions for the opinion of the Court were :—

1. Whether the goods seized were the goods of the claimant, as against the plaintiffs.

2. Whether, under the circumstances heretofore appearing, the schedule and receipt above mentioned were an inventory and receipt requiring registration under the Bills of Sale Act, 1878. (1)

The Queen's Bench Division held that the goods seized by the sheriff belonged to the defendant, as against the claimant.

The claimant appealed.

May 11. *Pocock* (*McIntyre, Q.C.,* with him), for the claimant, Salmon. It must be admitted that "inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods," are "bills of sale" within the words of the Bills of Sale Act, 1878, s. 4; but some restriction must be put upon the wide words of the enactment; and the true rule of construction is that inventories and receipts are within the Bills of Sale Act, 1878, only when they operate as assurances. In the present case the transaction between the sheriff and the claimant was complete by the sale of the goods and payment of the price before the inventory and receipt reached the claimant. *Woodgate* v. *Godfrey* (2) was decided upon the Bills of Sale Act, 1854, but its principle applies to the construction of the statute now in force.

R. V. Williams, for the plaintiffs. The Bills of Sale Act, 1878, was passed to remedy some defects existing in the earlier statute: the question in the present case turns chiefly upon the construction of s. 4, which is extended to inventories and receipts.

---

(1) By the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 2, "this Act shall come into operation on the 1st day of January, 1879."

Sect. 4. "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels."

Sect. 8. "Every bill of sale to which this Act applies shall be duly attested, and shall be registered under this Act within seven days after the making or giving thereof;" otherwise such bill of sale, as against trustees in bankruptcy and sheriff's officers, shall be void.

(2) 5 Ex. D. 24.

Under the earlier statute it was perhaps unnecessary to register a receipt: *Allsopp* v. *Day* (1); for that case, although doubted, is distinguished in *Ex parte Odell, In re Walden* (2); but the law is now altered by the express words of the Bills of Sale Act, 1878, s. 4.

[BRAMWELL, L.J. As *Alsopp* v. *Day* (1) is not overruled by *Ex parte Odell* (2), I feel myself at liberty to say that I consider the decision quite right.]

The schedule and the receipt were evidence of the title of the claimant; the intention of the legislature was that persons without means should not get credit by appearing to be owners of goods, which do not in truth belong to them; the present case is within the mischief of the statute, for Meadows was the ostensible owner of goods which had been bought by the claimant. *Woodgate* v. *Godfrey* (3) was decided upon the Bills of Sale Act, 1854, and cannot be considered an authority for the construction of the statute now in force.

McIntyre, Q.C., in reply. The reasoning in the judgment of Cockburn, C.J., in *Woodgate* v. *Godfrey* (4), when that case was heard before the Exchequer Division, shews that a receipt given by a sheriff's officer does not require to be registered.

Cur. adv. vult.

May 26. The following judgments were delivered:—

COTTON, L.J. This was an appeal by Joseph Salmon from an order of Williams, J., deciding that goods seized by the sheriff belonged, as against the appellant, to William Meadows. The question is whether a receipt and inventory taken by J. Salmon ought to have been registered under the Bills of Sale Act, 1878. The goods in question were originally those of Meadows, and on the 6th of January, 1879, the sheriff took possession of them under a writ of fieri facias issued upon a judgment obtained against Meadows by a Mr. Copland. On the same day Salmon agreed to purchase from the sheriff the goods, which were all the goods then on a farm in the occupation of the defendant, and paid

---

(1) 7 H. & N. 457; 31 L. J. (Ex.) 105.

(2) 10 Ch. D. 76.

(3) 5 Ex. D. 24.

(4) 4 Ex. D. 59.

(1) SC 8 Jur ns 41

Ante 80

a deposit of 40*l.* on account of the purchase-money, and thereupon the sheriff gave possession of the goods to Salmon, who nevertheless allowed the defendant to remain in possession. On the following day Salmon sent the sheriff a cheque for the remainder of the purchase-money, and on the 8th of January, 1879, the clerk of the sheriff's officer sent to Salmon a receipt dated the 7th of January, together with an inventory of the goods; the inventory was apparently affixed to the receipt by a pin only; but as the letter and receipt were written on the same piece of paper, and the former referred to the inventory and receipt, I think that the receipt and inventory must be considered as one document.

The receipt and inventory come within the expression a "bill of sale" as interpreted by the 4th section of the Act of 1878, under which the question arises. But the question remains whether, substituting the words "receipt" and "inventory" in ss. 3 and 8 of the Act for the expression "bill of sale," they are such an instrument as comes within the provisions of the Act. The words of the 3rd section are: "This Act shall apply to every bill of sale, whereby the grantee has power to seize or take possession of any chattels comprised in or made subject to such bill of sale." This points to the bill of sale being an instrument, on which the right of the claimant to some extent depends. Again, in the 5th section we find this enactment: "Any mode of disposition of trade-machinery by the owner thereof, which would be a bill of sale as to any other personal chattels, shall be deemed to be a bill of sale within the meaning of this Act." This shews that as regards trade-machinery the instrument to come within the operation of the Act must in some way dispose of the chattels. Sect. 8 provides that bills of sale to which the Act applies, not registered as required by the Act, shall, as regards chattels in the apparent possession of the person making the bill of sale, or in the case of the bill of sale being given by the sheriff, of the person against whom the process has issued, be null and void, thus assuming that when the bill of sale is avoided, the title of the holder as depending on it is gone. These provisions, in my opinion, lead to the conclusion that a document to be a bill of sale to which the Act applies, must be one on which the title of the transferee of the goods depends, either as the actual transfer of the property, or an agreement to transfer, or as a muniment or document of title taken, to use an expression found in some of the cases, at the time as a record of the transaction. Here the document was not a transfer of, or an agreement to transfer, the chattels to which Salmon had a complete title before the receipt was given, and independently of it, and there is no statement in the special case that at the time of his purchase from the sheriff he required a receipt, though I think it ought to be inferred from the letter of the 8th of January that when he sent the balance of 25*l.* he asked for a receipt.

The conclusion in my opinion is, that the transaction of purchase and sale was completed before the receipt was given or asked for, and that the document is not a bill of sale which under the Act requires registration. This decision is in accordance with the reasoning of the Master of the Rolls, when giving judgment in the Court of Appeal in *Woodgate* v. *Godfrey*. (1) That case, it is true, was a decision on the earlier Bills of Sale Act, which does not interpret "bill of sale" as including receipts; but his reasoning applies to the question whether the instrument, though a bill of sale within the interpretation of that term in the Act, is one to which the Act applies. In *Ex parte Cooper, In re Baum* (2), James, L.J., uses expressions which shew that he thought such an instrument as this would be within the present Act, but what he says was extra-judicial. Moreover, the decision in *Ex parte Cooper* (2) was explained in *Woodgate* v. *Godfrey* (1) as depending on this, that there was no sale independently of the document in that case, and probably the expressions of James, L.J., refer to a receipt taken under the circumstances existing in the case then before him. In my opinion, we ought not to destroy a title not impeached on the ground of fraud, for the mere want of registration of an instrument on which the title does not depend, unless on the fair construction of the Act the legislature has required it to be registered; and as under the circumstances of the present case the Act does not in my opinion apply, I think that the order appealed from must be reversed and the goods declared to be the goods of Salmon.

---

(1) 5 Ex. D. 24.

(2) 10 Ch. D. 320.

BRAMWELL, L.J. I am of the same opinion, and for the same reasons as those given by Cotton, L.J., but I wish to add some remarks of my own.

The legislature has thought it right to say that as against certain persons, such as execution creditors and trustees in bankruptcy, when it is attempted to separate the ownership of goods from the possession of them, a bill of sale shall be invalid unless it has been registered. The legislature has not thought it right to lay down in direct terms as a general rule, that where the property in goods is parted with and the former owner nevertheless remains in possession, the transaction shall be manifested by some document which must be registered. The draftsman of this statute has included in it various kinds of documents without regarding their nature, and unless such a construction is put upon the enactment as we are going to give it, it will become quite a snare. It would not occur to any person on the occasion of such a transaction as that before us to ask, that a receipt for the money paid by him should not be written out and sent to him; and it is a curious circumstance that this statute attributes to a document of that kind an operation and a character which in truth it does not possess. Every one knows that a receipt is strictly not evidence, and that the fact of payment must be proved by other means; yet the statute requires that a receipt shall be registered. I think that the proper interpretation of this enactment is that when the receipt is intended to be the instrument of transfer or a record of the transaction, then it is to be registered and attested as a bill of sale under the Act; but that where there is no evidence of any intention of that kind, it shall be unnecessary to register a receipt signed by the seller of the goods. I doubt whether s. 3 was intended to apply to such a case as this: I am inclined to think that this section was meant, not to limit the effect of the other provisions in the Act, but to extend them to a document of the description therein mentioned. I may further point out that s. 10, sub-s. 2, requires that an affidavit shall be filed together with the bill of sale. Under ordinary circumstances, a bill of sale together with the affidavit of its execution, will inform persons searching the register of what has been done; but the receipt which was signed in this case does not purport to be a conveyance, and it would be necessary to file a special affidavit saying that the receipt was given by a sheriff's officer in the execution of the process, under which he was in possession: in other words, it would be necessary to supplement the receipt by some affidavit as to the facts, for it would not disclose the whole transaction. I therefore concur in thinking that the receipt given in this case was not within the Bills of Sale Act, 1878, and did not require to be registered.

BRETT, L.J. It is beyond all dispute that some inventories and receipts must be treated as bills of sale, and attested and registered pursuant to the provisions of the statute under consideration; the question is whether all inventories and receipts must be so treated. I think that in the present case the documents cannot be treated as amounting to a bill of sale, and that our decision must be governed by the principles laid down by the Master of the Rolls in *Woodgate* v. *Godfrey*. (1)

In my opinion the legislature has intended to deal with various modes of evasion, and it thought that inventories and receipts might be used in evasion of the earlier Act, and it therefore enacted by the present statute that they should be registered. I may state my view of the objects of the legislature in the following terms: formerly a bill of sale might be given whilst the grantor was in possession of the property assigned, and afterwards he might be allowed by the grantee to remain in possession of it, so that the change of ownership was not apparent. Thereupon the legislature intervened, and by the Bills of Sale Act, 1854, required that bills of sale should be registered. Attempts were made to evade this enactment, and a person, who was in possession of goods, on which he decided to give a security the existence of which should not be generally known, might try to evade the enactment by making a verbal agreement to pass the property, and giving at the same time an inventory of the goods, and a receipt for the price, the person who made the agreement and gave the inventory and the receipt, being in possession of the goods and not going out of it. A transaction of that kind was clearly entered into for the purpose of evading the Bills of Sale Act, 1854, for the receipt and the inventory were used in the same manner as a bill of sale would have been used. Thereupon the Act of 1878 was passed. In the present case at the time when the property in the goods passed to Salmon, the claimant, they were not in the possession of the owner; they were in the possession of the law, that is to say, of the sheriff, who parted with them and placed them under the control of the claimant. This seems a wholly different transaction from giving a bill of sale in the mode, in which it is usually given; still if a bill of sale had in fact been given by the sheriff, it would have been necessary to register it; and further it might have been necessary to register a bill of sale, if at the time of the sale it had been agreed that the property in the goods should be transferred by a bill of sale to be afterwards executed; but it is not necessary to determine this point. In the present case, whether this receipt was or was not given, was wholly immaterial; it was not given in consequence of any agreement, or with reference to the passing of the property; it was merely given as an acknowledgment for the money which had been previously paid. I repeat that in my opinion the case before us is governed by the principles laid down by the Master of the Rolls in *Woodgate* v. *Godfrey* (1), and I am of opinion that this inventory and receipt do not constitute a bill of sale within the meaning of the Act, and did not require registration.

---

(1) 5 Ex. D. 24, at p. 26.

Judgment reversed.

Plaintiffs in person.
Solicitor for claimant: *Oliver.*

---

(1) 5 Ex. D. 24, at p. 26.

J. E. H.

CULLEY, APPELLANT; CHARMAN, RESPONDENT.

1881
May 31.

Poor Law—Husband and Wife—Non-liability of Husband to maintain Adulterous Wife—31 & 32 *Vict. c.* 122, *s.* 33.

A husband is not liable to be ordered, under 31 & 32 Vict. c. 122, s. 33, to maintain a wife with whom he has ceased to cohabit in consequence of her adultery.

CASE stated by justices in petty sessions, the facts of which were in substance as follows:—

A complaint had been made on the 23rd of December, 1880, by the respondent, the relieving officer of the Cookham Union, on behalf of the guardians, against the appellant, for that the appellant, being a person able to maintain his wife, had neglected to do so, whereby she became chargeable to the common fund of the Cookham Union.

On the hearing it was proved and admitted that the appellant was able to maintain his wife, and that she had become chargeable to the Cookham Union, but that in November, 1880, she had committed adultery, since when the appellant had never cohabited with her. The justices were of opinion that the appellant was liable, and ordered him to pay the sum of 4*s.* per week to the guardians of the union towards the maintenance of his wife, subject, however, to the opinion of the Court on the question whether the appellant was liable to pay to the union for the maintenance of the wife, she having committed adultery, which had not been condoned.

McCall, for the appellant. It was held under the Vagrant Act, 5 Geo. 4, c. 83, s. 3, that a man could not be punished for neglecting to maintain an adulterous wife: *Rex* v. *Flintan*. (1) The complaint in this case may be treated as made under that Act or 31 & 32 Vict. c. 122, s. 33, but it is submitted that the same reasoning applies to the latter Act as to the Vagrant Act. The husband is, by the terms of the section, to be summoned to shew cause why an order should not be made upon him to maintain his wife. This implies that the husband is not necessarily and in all cases liable.

---

(1) 1 B. & Ad. 227.

H. D. Greene, for the respondent. The decision in *Rex* v. *Flintan* (1) turned on the language of 5 Geo. 4, c. 83, s. 3, which only made the husband criminally responsible if he was legally bound to maintain the wife and neglected to do so. The words of 31 & 32 Vict. c. 122, s. 33, are altogether different. The power there given is quite independent of the common law liability. The section must be construed in connection with other similar provisions of the poor law with regard to the support of relatives whom there is no liability at common law to support. There is no express exception of an adulterous wife, and it is submitted that none can be implied.

[HAWKINS, J. Suppose for the sake of argument that the wife having run away from her husband with another man absolutely refuses to return, though the husband is willing to receive her, could it be contended that the statute means to make him liable to maintain her?]

He cited *Thomas* v. *Alsop.* (2)

HUDDLESTON, B. This case is too clear for argument. The case of *Rex* v. *Flintan* (1) is a distinct authority in favour of the appellant. Littledale, J., says in that case that the wife "having rendered herself unworthy of her husband's protection, she returns to the same state as if she were not married," and that "if the husband is not liable to answer for the wife's contracts or to receive her into his house, it cannot be said that he is legally bound to maintain her." The respondent's counsel says that that decision only applies to cases under the Vagrant Act, and not to a case under 31 & 32 Vict. c. 122, s. 33, which, according to his contention, makes a husband liable to support his wife under all circumstances. But the appellant's counsel has pointed out that the section gives the husband an opportunity of shewing cause why he should not be ordered to pay for the support of his wife. This presupposes that there are cases in which the husband is not liable, and it seems to me that a case where the wife has forfeited

(1) 1 B. & Ad. 227.

(2) Law Rep. 5 Q. B. 151.

her position by committing adultery, and such adultery has not been condoned, is one of such cases, and one in which there is a complete answer to the application against the husband. There clearly would be no civil liability in such a case for the debts of the wife, and it seems to me that there is no liability under the Poor Law Acts.

HAWKINS, J. I do not think there is any need to cite authorities to shew that a husband is not bound at common law to maintain a wife who has been guilty of adultery, and who is living apart from him; the question is, whether it was the object of this statute to impose a liability upon him in such a case that did not exist before. I do not hesitate to come to the conclusion that it was not, and that the order ought not to have been made. It seems to me impossible to suppose that the statute intended to cast on the husband the obligation of maintaining a wife who has committed adultery and gone away from him.

BOWEN, J. I am of the same opinion.

Judgment for the appellant.

Solicitor for appellant: *Scarlett, for F. A. Jones.*
Solicitor for respondent: *Mandar, for Ward.*

E. L.

1881
April 1.

[IN THE COURT OF APPEAL.]

HONCK *v.* MULLER.

Contract—Sale of Goods to be delivered by Instalments—Failure as to one Instalment—Right to cancel Contract.

9 QBD 652, 655, 7-8, 670

The defendant in October, 1879, sold to the plaintiff, and the plaintiff bought of the defendant, 2000 tons of pig iron at 42*s.* a ton, to be delivered to the plaintiff free on board at maker's wharf, at Middlesborough, "in November, 1879, or equally over November, December, and January next, at 6*d.* per ton extra." The plaintiff failed to take delivery of any of the iron in November, but claimed to have delivery of one-third of the iron in December and one-third in January. The defendant refused to deliver these two-thirds, and gave notice that he considered that the contract was cancelled by the plaintiff's breach to take any iron in November:—

Held, in an action by the plaintiff for damages, in respect of the defendant's refusal (Brett, L.J., dissenting), that by the plaintiff's failure to take one-third of the iron in November, the defendant was justified in refusing to deliver the other two-thirds afterwards.

The decision in *Hoare* v. *Rennie* (5 H. & N. 19) held to be right by Bramwell and Baggallay, L.JJ., and wrong by Brett, L.J.

In this action the plaintiff sought to recover damages from the defendant for refusing to deliver to the plaintiff one-third of 2000 tons of iron in December, 1879, and one-third of such iron in January, 1880, according to the terms of the following contract of sale:

"Middlesborough-on-Tees, Oct. 27, 1879.

"Sold to John Honck, Esq.,
"8, Hill Side,
"Crouch Hill, London,

"2000 (Two thousand) tons No. 3 G. M. B. Middlesbro' pig iron, at 42*s.* (forty-two shillings) per ton, f. o. b. maker's wharf here.

"Delivery November, 1879, or equally over November, December, and January next at 6*d.* per ton (sixpence) extra.

"Payment, nett cash here against bills of lading.

"Tees conservancy dues payable by shipper.

"Under this contract buyer and seller alike shall be free from any liability, should they be unable to receive or deliver owing to strikes or other combinations, or to accidents or such like unavoidable circumstances, and the contract shall be prolonged for a period corresponding to the duration of interruptions arising from any of the above causes.

(Signed) " per pro E. C. Muller.
" T. C. Davison."

The defence as pleaded, was mainly, inter alia, that the plaintiff made default in taking delivery in November, or in declaring whether he would take the whole or part only of the contract quantity in that month, and that therefore the defendant was entitled to give the plaintiff notice, as he did, that he would not deliver any of the said iron to the plaintiff. The defendant, however, paid 66*l.* 13*s.* into court to satisfy the plaintiff's claim, lest contrary to what the defendant contended for, the plaintiff should be entitled to recover anything in the action.

The plaintiff replied that the sum paid into court was not sufficient to satisfy his claim, and issue being joined on the statement of defence, the cause was tried before Field, J., in London, during the Trinity sittings of last year. At that trial it was proved that on the 1st of November, 1879, the defendant wrote to Mr. Caleb Bloomer, the broker in London, through whom the plaintiff bought the iron of the defendant, asking for a delivery order, and requesting to know whether there was any chance of the plaintiff's taking the whole of the iron in that month of November; and to that letter Mr. Bloomer replied that Mr. Honck could not yet decide, but that he would give seven days' notice of his decision when he had decided. Several other letters passed between the parties, of which the following only are material.

"Middlesborough, November 17th, 1879.

" John Honck, Esq., London.

" Dear Sir,—I beg reference to contract of 27th Oct. for 2000 tons pig iron, according to which you have the faculty to take the whole in November, or one-third in each month, November, December, and January. Will you be good enough to inform me what quantity you wish to take this month over and above the minimum quantity of 666 tons due this month, and kindly send me your delivery instructions.

"I am, yours truly,
(Signed) "per pro E. C. Muller,
"T. C. Davison."

"5, Union Court Chambers, Old Broad Street,
London, E.C., Nov. 22nd, 1879.

"E. C. Muller, Esq.

"Dear Sir,—I am sorry I was out on the several occasions of your calling here this week, for it would have given me pleasure to have a talk. Mr. Honck asks me to say he will be obliged if you will defer shipping any of his iron until December, so allowing him to take delivery of all in December and January.

(Signed) "Caleb Bloomer."

"Middlesbro', Dec. 1, 1879.

Mr. John Honck.

"Dear Sir,—I beg to refer you to my (letter) of 17th ult. to which I have received no reply. I have since then written several times also to your broker, Mr. Caleb Bloomer, pressing for orders for delivery of your iron, but could elicit no satisfactory reply. You ought to have taken delivery of a large portion of your iron during last month, and as you have failed to do so, I have been put in a very awkward position with regard to your whole contract; in fact, I cannot keep any contract on my books which is not executed properly. I must therefore give you notice that I have removed from my books and cancelled the contract for 2000 tons No. 3, which you had with me. I do this in order to protect myself from any further loss in the matter.

"I remain, yours truly,
(Signed) "E. C. Muller."

"London, 2nd Decbr., 1879.

"E. C. Muller, Esq.

"Dear Sir,—Yours to hand in due course. My reason for not replying to yours of the 17th was that Mr. Bloomer, my broker, did so; and as the end of the month drew on prices hardened; hence, the reason I did not give shipping orders. I am therefore at a loss to see your reason for saying you have cancelled my contract to prevent further loss. In fact, I will not allow such a thing to be done.

" My iron is under offer, and I expect it to be accepted; you must, therefore, accept notice that I hold you responsible for any loss in any case. You will have shipping orders in a few days.

" Yours truly,
(Signed) " John Honck."

The defendant replied, by saying that he should stand by his letter of the 1st of December, and he persisted afterwards in holding the contract to be cancelled.

The plaintiff sold the iron he had so bought of the defendant to Messrs. McArthur, Son, & Co., who sold it to Messrs. J. Watson & Co., and the defendant having refused to deliver the iron the present action was brought, in which the plaintiff claimed the difference between the contract and market price of $666\frac{2}{3}$ tons, being one-third of the iron at the end of December, 1879, and of $666\frac{2}{3}$ tons at the end of the following January.

At the trial a verdict and judgment was given for the plaintiff for 933*l.* 6*s.* 8*d.*, less the 66*l.* 13*s.* which the defendant had paid into court.

The defendant afterwards obtained from the Queen's Bench Division a rule nisi for a new trial, which was subsequently discharged, and thereupon the defendant appealed, and gave notice that this Court would be asked to give judgment for the defendant.

McIntyre, Q.C., and *Henn Collins*, for the defendant. This is an indivisible contract for the sale to the plaintiff of 2000 tons of pig iron. The mode of its delivery is to be at the option of the plaintiff, who is to elect whether he will have the whole 2000 tons in November or whether he will have it delivered in three equal proportions spread over the three months of November, December, and January; and before the defendant can be called upon to deliver any of the iron the plaintiff must elect how he will have it delivered; therefore the plaintiff must make such election, and communicate it to the defendant in sufficient time to enable him to deliver the whole 2000 tons or one-third only, as the plaintiff may elect to take, in that month of November. This is the meaning of the contract, or else it means that if the plaintiff does not inform the defendant that he wishes to have one-third of the iron delivered in November, one-third in December, and the remaining third in January, the plaintiff is to take the whole 2000 tons in November. If the plaintiff had such option as suggested the correspondence shews that he never exercised it but broke his part of the contract altogether. He never gave any notice that he would take all or any of the iron in November, but, on the contrary, he refused to take any of the iron in that month, and required to have the whole of it in the other two months. By that breach on the part of the plaintiff the defendant was entitled to treat the contract as rescinded, and was not bound to deliver the iron: *Hoare* v. *Rennie* (1), *Reuter* v. *Sala* (2), and *Withers* v. *Reynold*. (3) The plaintiff will rely on *Simpson* v. *Crippin* (4), in which the case of *Hoare* v. *Rennie* (1) is commented on and questioned, but that case has never been overruled, and in *Bradford* v. *Williams* (5) it was cited with approbation and followed. (6)

C. Russell, Q.C., and *Channell*, for the plaintiff. There is nothing in the contract which made it necessary for the plaintiff to declare, as the defendant contends, whether he elected to take the whole of the iron in November or not. If nothing is said by the plaintiff he is entitled to have, and also is bound to accept, one-third of the iron in November, but the meaning of the contract is, that in addition to such third he can have the whole of the iron delivered in November if he elects to have it and gives due notice of this to the defendant. It is admitted that the plaintiff committed a breach of the contract in not taking a third of the iron in November, but as there was really no difference between the market and contract price during that month such breach was immaterial, and the damages merely nominal. Such breach by the plaintiff did not entitle the defendant to rescind the contract, and to refuse to deliver the iron in the other months according to the contract. The breach in November was an insignificant one, and did not go to the whole consideration of the contract, so that the case comes within the principle laid down in the notes to *Pordage* v. *Cole* (1), and acted on in *Simpson* v. *Crippin* (2), *Jonassohn* v. *Young* (3), and *Freeth* v. *Burr.* (4) The doctrine in *Hoare* v. *Rennie* (5) has been seriously doubted in subsequent cases, and, as stated in the notes to *Cutter* v. *Powell* (6), "the weight of authority is largely opposed to it."

---

(1) 5 H. & N. 19; 29 L. J. (Ex.) 73.

(2) 4 C. P. D. 239.

(3) 2 B. & A. 802.

(4) Law Rep. 8 Q. B. 14.

(5) Law Rep. 7 Ex. 259.

(6) There was an argument as to the principle on which the damages were to be assessed, viz., whether they were to be ascertained by reference to the market price in December and January, or when the defendant refused to deliver, or whether the fact that the plaintiff could then have gone into the market and obtained a forward contract was not to be considered in diminution of the damages, and the following cases were cited: *Roper* v. *Johnson* (Law Rep. 8 C. P. 167); *Brown* v. *Muller* (Law Rep. 7 Ex. 319); *Warrin* v. *Forrester* (4 Scotch Sess. Cas. 190, 4th Series). This argument is omitted, as the decision being ultimately given in favour of the defendant (the appellant) it became unnecessary to determine such question, and no notice is consequently taken of it in the judgments of either of the learned judges.

McIntyre, Q.C., replied, citing *Deverill* v. *Burnell.* (7)

Cur. adv. vult.

April 1. BRAMWELL, L.J. I think it unnecessary to determine which of the several meanings put on the agreement in this case is right. For whichever is adopted I think the result should be the same. But it seems to me that the meaning is, that the plaintiff had the option to have the 2000 tons in November, or in equal portions in November, December, and January; and that unless he elected in November in time to have the whole delivered in November if he so elected, or in time to have one-third delivered in November if he elected to have the iron in three deliveries, he has no cause of action. And I think he did not elect. Such election, of course, includes notice of his option to the defendant. He certainly did not say in November that he would have all in November, nor did he say he would have three deliveries. What I have said seems to me the natural meaning. If it is not, then the contract means 2000 tons in November, unless the plaintiff should elect as he might to have them in equal portions in November, December, and January. I think he did not so elect, and having failed to take the 2000 tons in November, has no cause of action. But I will assume as the plaintiff says, though I think otherwise, that whichever construction is right the plaintiff elected to have the iron in three equal portions in November, December, and January. I am of opinion even then that the defendant is entitled to our judgment. Before saying why, I think it fair to the defendant to say I can see no shuffling in his conduct, nor any motive for repudiating the bargain other than a legitimate one. I do not find that iron had risen in price. I think it very likely the iron was at the wharf of the seller, and that the plaintiff was pressed by him to take it. But however this may be, I think his contention right.

---

(1) 1 Wm. Saund. 319l.

(2) Law Rep. 8 Q. B. 14.

(3) Law Rep. 9 C. P. 208.

(4) 4 B. & S. 296; 32 L.J.(Q.B.)385.

(5) 5 H. & N. 19; 29 L. J. (Ex) 73.

(6) Sm. L. C. 8th ed. p. 48.

(7) Law Rep. 8 C. P. 475.

The case for the plaintiff is, that by the contract, or what was done under it, he was to take and was entitled to have $666\frac{2}{3}$ tons in each of the months of November, December, and January. That though he (the plaintiff) broke his contract in not taking the $666\frac{2}{3}$ in November, and though the defendant at once gave notice he would not go on with the contract he (the plaintiff) has a right to insist on the December and January deliveries. In other words, the plaintiff says that having agreed to take 2000 tons he has a right or power to demand and take $1333\frac{1}{3}$ and no more. I cannot think so. I think that contention is contrary to law and justice alike. I think where no part of a contract has been performed, and one party to it refuses to perform the entirety to be performed by him, the other party has a right to refuse to perform any part to be performed by him. I think if a man sells 2000 tons of iron he ought not to be bound to deliver $1333\frac{1}{3}$ only, if it can be avoided. I can see no difference in principle between where the deliveries are at different dates and where they are to be all at once. I think the plaintiff no more entitled to the delivery of these $1333\frac{1}{3}$ tons than he would be if he was to take 2000 tons in November, and send shipping for $1333\frac{1}{3}$ tons only in that month at such a time that no more could be delivered, and he said that he would take no more. Suppose it was a purchase

1881

HONCK v. MULLER.

Bramwell, L.J.

of 100 yards of silk at so much a yard, and the buyer came for fifty only, could he insist on it? Would it make any difference that fifty yards were to be taken and paid for on Monday and fifty on Tuesday, and the Monday's delivery was not taken but refused, and then the Tuesday's was demanded? If there was a charter for an out-and-home voyage, and the charterer refused to load for the out voyage, could he insist on the ship taking his cargo for the home voyage? Suppose 10,000 tons of coal bought to be delivered at Gibraltar, Aden, and Bombay, in equal quantities—at Bombay in January, at Aden in February, and at Gibraltar in March, and no delivery at Bombay, could the buyer be made to take the other deliveries? Suppose a contract to supply bread to a workhouse for a year from the 1st of January, and the contractor says he will supply and does supply none in January, can he insist on supplying in the other eleven months? Suppose he does not supply for eleven months, can he insist on supplying in December? Would it make any difference if he was paid monthly? I hope not—I think not. Suppose a man orders a suit of clothes, the price being 7*l.*—4*l.* for the coat, 2*l.* for the trousers, and 1*l.* for the waistcoat, can he be made to take the coat only, whether they were all to be delivered together, or the trousers and waistcoat first? The party to a contract so broken has a right not to rescind the contract, for rescission is the act of both parties, but a right to declare he will not perform a part only of his contract, viz., what would remain to be performed if the other party had performed his part, and so enabled the performance of the whole. If, indeed, the contract has been part performed and cannot be undone, then it must be proceeded with without such power of declaring off. If in this case the plaintiff had taken the November delivery, but had refused the December, the defendant would have been bound to make the January delivery. See what the consequence is of a different conclusion. The defendant would sell 2000 tons of iron and have so many pounds sterling. He is made to sell two-thirds only of the iron and have two-thirds only of the pounds sterling and a right of action. Suppose the November delivery would have been a profit to the defendant, and the December and January deliveries a loss, why is he to

1881

HONCK
v.
MULLER.

Bramwell, L.J.

bear the loss and have no security that he will get the profit? This reasoning would no doubt apply where there is part performance, but then there is no help for it. It is asked whether every trifling breach of contract is attended with this consequence. I know not; but $666\frac{2}{3}$ tons out of 2000 are not a trifle. If it must be something which goes to the "root" of the contract, as was said, surely one-third of the subject-matter does. The case of *Hoare* v. *Rennie* (1) is in point. The same thing was decided a few days ago in *Englehart* v. *Bosanquet.* (2) It was there held that on a sale of 2000 tons of sugar to come in two ships when the first ship was not equal to contract, the buyer was not bound to take the other. But it is said that *Hoare* v. *Rennie* (1) has been overruled by *Simpson* v. *Crippin.* (3) That is not so. That decision was quite right. The case was distinguishable from *Hoare* v. *Rennie* (1), for the contract had been part performed and could not therefore be undone. One may express a respectful agreement with what the learned judges said in *Simpson* v. *Crippin* (3), viz., that they did not understand *Hoare* v. *Rennie.* (1) The other cases cited are distinguishable on the same ground. It has never yet been held that a man may break his contract, render the performance of the whole impossible, and though nothing has been done under it, insist on the performance of the remainder. *Pordage* v. *Cole* (4) has absolutely nothing to do with the case. That was an action on a specialty. This is not. As to the argument that in a case like the present there are really three contracts for three parcels, that is wholly erroneous. In parol contracts, the whole of what is to be done on one side is the consideration for the whole of what is to be done on the other. The seller does not sell, the buyer does not buy, any parcel of $666\frac{2}{3}$ tons any more than when the suit of clothes is sold there is a separate sale of coat, waistcoat, and trousers.

I am of opinion that the judgment should be reversed.

BAGGALLAY, L.J. The agreement in this case was for the sale by the defendant to the plaintiff of 2000 tons of iron, to be delivered at Middlesborough in November, 1879, or at the option of the plaintiff in equal proportions, but at an increased price of 6*d.* per ton, in the months of November, December, and January.

---

(1) 5 H. & N. 19; 29 L. J. (Ex.) 73.

(2) Not reported.

(3) Law Rep. 8 Q. B. 14.

(4) 1 Wm. Saund. 319.

In the course of the argument three different views have been suggested as to the true meaning of the agreement:

1. That relied on by the plaintiff, that, unless he made an election to take all in November, the contract was for the delivery in three equal portions in the three months.

2. That relied upon by the defendant, that the plaintiff was bound to make his election in November, and to communicate it to the defendant in sufficient time to enable the defendant to deliver the whole or the one-third, as the case might be, in that month.

3. An alternative suggestion of the defendant that the plaintiff was to take the 2000 tons in November, unless he gave notice to the defendant before the expiration of that month that he elected to have the cargo delivered in equal portions in the three months.

I agree with Lord Justice Bramwell in thinking that the second view, that contended for by the defendant, is the most in accordance with the language of the correspondence, and further, that whether it or the third be adopted, the plaintiff has no cause of action. It is not suggested that any notice was given by the plaintiff in the month of November. This would appear to me to be sufficient to entitle the appellant to a reversal of the decision from which he has appealed. But so strong an argument has been addressed to us in support of the construction of the contract contended for by the plaintiff, that I deem it right to express my opinion as to what our decision ought to be, upon the basis of such construction being adopted.

As to this also, I have arrived at the same conclusion as Lord Justice Bramwell. Were it not for the authority of *Simpson* v. *Crippin* (1), which has been much pressed upon us, I should have felt no doubt as to the propriety of holding that the refusal by the plaintiff to accept the first portion of the cargo, in accordance with the provisions of the contract as construed by himself, was a sufficient justification for the defendant's refusal to deliver the remaining portions. It is, to my mind, impossible to reconcile the decision in *Simpson* v. *Crippin* (1) with that in *Hoare* v. *Rennie* (2), except in the manner pointed out by Lord Justice Bramwell, but I do not find that the decision in *Simpson* v. *Crippin* (1) was in any way rested upon the distinction pointed out by the Lord Justice. Indeed, Mr. Justice Mellor stated in his judgment that he was unable to distinguish the two cases. If, then, the decision in *Simpson* v. *Crippin* (1) is to be considered as conflicting with that in *Hoare* v. *Rennie* (2), and I think it was so considered by the judges who decided it, I am bound to say that I adopt the principles enunciated in the latter case as being more in accordance with reason and justice than those upon which the former was expressed to be decided. The principles upon which that case was decided are so clearly expressed in the reported judgments, that I need not refer to them in detail. I may mention that in the case of *Bradford* v. *Williams* (3), which was decided in the early part of the same year as *Simpson* v. *Crippin* (1), *Hoare* v. *Rennie* (2) was quoted and recognised, and the principles upon which it was decided adopted. *Bradford* v. *Williams* (3) was mentioned in argument in *Simpson* v. *Crippin* (1), but was not noticed in any of the judgments. I am of opinion that the judgment should be reversed.

---

(1) Law Rep. 8 Q. B. 14.

BRETT, L.J. I am sorry to say that in this case I differ from the views of the two other members of this Court.

This is the case of a contract for the sale and delivery of goods at a price per ton. If the price were one whole price for the whole amount to be delivered, the sort of question which has arisen in this case would not have arisen. The long discussion which has taken place as to this kind of contract, is where the contract is for separate and successive deliveries of goods at a price per ton. It does not seem to me to be necessary in this case to determine precisely the rights of the parties as to deliveries under this contract. I am, however, inclined to think that where, as in this case, the contract is for the delivery of goods by the vendor free on board, the choice as to whether the whole is to be delivered in November or whether it is to be in three successive periods, is the choice of the person who has to deliver, and therefore that the choice was with the defendant, but it is immaterial to determine this. In the result, this case seems to me to be a contract for the delivery of iron at three different periods at a price per ton. The action is for non-delivery, and the question is whether the failure of the plaintiff to take the first delivery prevents him from requiring a delivery at the two successive periods.

---

(1) Law Rep. 8 Q. B. 14.

(2) 5 H. & N. 19; 29 L. J. (Ex.) 73.

(3) Law Rep. 7 Ex. 259.

Now it is admitted that if the first delivery was made, and the second was not, but the third was, that then the failure by the seller to offer the second delivery would be no objection to his right to insist upon the acceptance of the third. That is admitted. But it is said that if there be a failure to offer the first delivery, the acceptance of the second cannot be insisted upon. Now what is the rule of law by which a court of law ought to deal with mercantile transactions of this kind? To my mind merchants are not bound to make their contracts according to any rule of law, but the court of law, from the language which has been used, and from the known course of business amongst merchants with regard to the subject-matter of such contracts, must determine what is the interpretation to be put on such contracts amongst reasonable merchants, and when they have ascertained what that is, the Court ought to apply it to the particular contract in question in the way in which reasonable business men, in the ordinary course of business, would apply it.

Now such a contract as this in the present case, for successive deliveries of goods at a sum per measure, is a somewhat modern kind of contract, but it has now been in existence for many years. It has been frequently considered, and the rule with regard to its construction seems to me to be this, that where the deliveries are to be so made, and the price of each to be so determined, then, inasmuch as the failure to perform one of the deliveries can be satisfied by damages, the failure in respect of one delivery does not prevent the party from having the other deliveries. That is

1881

HONCK
v.
MULLER.

Brett, L.J.

not what is decided in *Pordage* v. *Cole* (1), but is the doctrine contained in the notes to that case. The Courts have not laid down that doctrine as an abstract proposition of law, but they have gathered it from the course of business amongst merchants, that where merchants have so contracted by separating the price, as in case of failure of one of the deliveries, to give an adequate remedy for it, that it is not their intention that such non-delivery should put an end to the contract and prevent the party so failing from having a right to make subsequent deliveries.

But it is suggested that if there is a failure in the first delivery, then the party against whom that failure is committed may throw up the contract. But why? Supposing at the time of the first delivery there is no difference between the market price and the contract price of the goods, the person against whom the failure is made suffers positively no loss. But at the time of the second delivery the difference between the market price and the contract price may be enormous; yet at the time of the third delivery it is said, if you have fulfilled the contract as to the first delivery, where it did not signify whether you did or not, but have failed in the second delivery, where it was of the utmost consequence, nevertheless, you can insist upon the third delivery, but if you have failed in the first delivery, where it was of no consequence at all, then, although the question of delivery of the second and third is of the utmost consequence, your right to them is to be of no avail. It seems to me that such a conclusion is so strained that, with the greatest possible respect, I should say as matter of business it is absurd. Then is one bound to come to such a conclusion when one's duty is to apply that which would be the conduct of all reasonable merchants? It seems to me that one is not. The notes to *Pordage* v. *Cole* (1) seem to me to be clear, and to make no distinction whatever as between the first delivery or any other. The case of *Simpson* v. *Crippin* (2) distinctly states there is no difference with regard to the first delivery or any other. It is objected to that case that the learned judges said they did not understand the case of *Hoare* v. *Rennie*. (3) It seems to me not that they meant to say they did not understand *Hoare* v. *Rennie* (1), but that they could not understand that the principle of law was rightly applied there. In other words, they meant to say they differed from *Hoare* v. *Rennie.* (1) So do I, for the reasons I have given. In my opinion *Hoare* v. *Rennie* (1) was wrongly decided, and I prefer *Simpson* v. *Crippin.* (2) I prefer what Lord Blackburn said in that last case, namely, in such a contract as this the doctrine contained in the notes to *Pordage* v. *Cole* (3) ought to be applied. With regard to the case of *Englehart* v. *Bosanquet* (4), the facts there seem to have been exactly like those in *Hoare* v. *Rennie* (1), and therefore the judges were bound to follow that case. But in the Court of Appeal we are not bound to do so, and I prefer the doctrine laid down in *Simpson* v. *Crippin* (2) by the judges who, to my mind, shewed that in their opinion *Hoare* v. *Rennie* (1) was wrongly decided. I think that they were right and that *Hoare* v. *Rennie* (1) was wrong.

---

(1) 1 Wm. Saund. 319 l.

(2) Law Rep. 8 Q. B. 14.

(3) 5 H. & N. 19; 29 L. J. (Ex.) 73.

Judgment reversed.

Solicitors for plaintiff: *Digby & Jones.*
Solicitors for defendant: *Van Sandau & Cumming.*

---

(1) 5 H. & N. 19; 29 L. J. (Ex.) 73.
(2) Law Rep. 8 Q. B. 14.
(3) 1 Wm. Saund. 319 l.
(4) Not reported.

W. P.

1881
April 1.

[IN THE COURT OF APPEAL.]

THE MAYOR AND THE FREE BURGESSES OF THE BOROUGH OF SALTASH *v.* GOODMAN AND BLAKE.

Fishery—Oysters—Navigable River—Corporation—Crown Grant—Several Fishery—Prescription—Claim of Inhabitants to Dredge—Immemorial Usage.

The plaintiffs, the mayor and free burgesses of a borough, were incorporated by Royal charters, and claimed to be entitled to a several oyster fishery in a tidal navigable river. The defendants, who were sued for trespasses to this fishery, were the free inhabitants of ancient tenements in the borough. The free inhabitants of ancient tenements in the borough had from time immemorial, without interruption and claiming as of right, exercised the privilege of dredging for oysters in the river from the 2nd of February in each year to Easter Eve in each year, and of catching and carrying away the same without stint for sale or otherwise. The acts complained of were done in the exercise of this privilege. The plaintiffs produced no actual grant from the Crown of a several oyster fishery, but they proved a user (by evidence inter alia of leases by the corporation since 1680, of the exclusive right to dredge during the whole year, and of receipt of money by the corporation for oysterage), from which user, but for the privilege so exercised by the free inhabitants of the borough, a grant from the Crown of such several fishery ought to be inferred to have been made to the predecessors of the plaintiffs as early as Henry II.:—

Held (Baggallay, L.J., dissenting), that the privilege exercised by the free inhabitants did not prevent the inference of there having been such a grant to the predecessors of the plaintiffs:

Held (by Brett and Cotton, L.JJ.), that considering the user proved by the plaintiffs no inference should be drawn, from the exercise of such privilege by the free inhabitants, that in the grant of the several fishery to the plaintiffs there was either an exception of this period during which the said privilege of the free inhabitants had been exercised, or a trust declared for such inhabitants during that period.

Reversed by H of L 7 App Cas 633.

APPEAL from the judgment of the Common Pleas Division given in favour of the plaintiffs on a special case. (1)

The special case, which is fully set forth in the report in the Common Pleas Division, was stated in an action brought against two inhabitants of the borough of Saltash in Cornwall, to determine a question as to the alleged right of the defendants, as such inhabitants, to dredge for oysters and carry away the same without stint, for sale or otherwise, in a certain part of the river Thamer, within the liberties of the said borough.

---

(1) 5 C. P. D. 431.

The plaintiffs were a corporation incorporated by Royal charters granted—27 Eliz., 30 Car. 2, 35 Car. 2, and 14 Geo. 3—and they claimed to be possessed of a several oyster fishery in that part of the river Thamer in which the acts complained of were committed by the defendants, and which it was admitted was a navigable river or arm of the sea where the tide flows and reflows. The acts complained of were done by the defendants in the exercise of a privilege thus described in the 9th paragraph of the special case. "The free inhabitants of ancient tenements in the borough of Saltash, have from time immemorial without interruption, and claiming as of right, exercised the privilege of dredging for oysters in the locus in quo mentioned in the statement of claim from the 2nd day of February in each year, to Easter Eve in each year, both inclusive, and of catching and carrying away the same without stint, for sale or otherwise."

The charter of 27 Elizabeth, which incorporated the town or borough of Saltash, confirmed three previous Royal charters; one granted by Henry VIII. confirming another granted by Edward IV., which confirmed a charter granted by Richard II., confirming the charter therein recited, which Reginald de Vantort made to the free burgesses of Essa, by which name the town of Saltash had been anciently known. The privileges thereby granted did not, however, include a fishery of any kind. The charter of 27 Eliz., besides confirming these previous charters, contained the following recital: "And whereas the said burgesses of Essa, from the time whereof the memory of man is not to the contrary, have peaceably had, held, and enjoyed the aforesaid rights, jurisdictions, liberties, franchises, acquittances, and privileges, and divers other customs, liberties, immunities, exemptions, and jurisdictions, as well by prescription as by reason and pretext of the aforesaid charter, grants, and corporations of old time, made as well by the aforesaid Reginald de Vantort as by others our aforesaid progenitors, kings of England, to the aforesaid free burgesses of Essa and their heirs and successors." The language of the said charter of Queen Elizabeth, in confirming all customs and privileges to the corporation of the borough of Saltash, is sufficiently fully stated in the judgment of Baggallay, L.J. This charter of Queen Elizabeth was confirmed by the charter of

1881

CORPORATION OF SALTASH *v.* GOODMAN.

Post 110

30 Car. 2. The charter of 35 Car. 2, after reciting that the mayor and free burgesses of Saltash had surrendered their charters and privileges into the king's hands, contained a regrant of the same to such mayor and burgesses as before. The charter of 14 Geo. 3 ratified and confirmed all that had been so previously granted. In support of the plaintiff's claim, there was evidence of long user and acts of ownership, consisting of the records, leases, and documents mentioned in the report of the case before the Divisional Court, and which were set out in the appendix of the case. Amongst these was the record and decree in *Rudiard* v. *Porter,* an action in the time of Queen Elizabeth for trespass on this fishery, in which the defendants, as the free burgesses of Saltash, justified committing the acts complained of as done under the above-mentioned charter of Queen Elizabeth, and by the decree it was ordered that the mayor and burgesses should have and enjoy all the rights and privileges as claimed by their answer according to the meaning of the said charter without disturbance of the plaintiffs. There were also several leases granted by the corporation, of the sole privilege of dredging for oysters in the river Thamer during the whole period of each year (one of such leases being made as far back as in the year 1680), and also receipts were produced of money paid to the corporation by way of rent for oysterage, at various times from 1750 to more recent years.

The Divisional Court were of opinion that the defendants were not entitled to exercise the privilege they claimed, viz., to dredge for oysters and to carry away the same without stint for sale or otherwise between the 2nd of February and Easter Eve in each year, either as subjects of the realm, as free inhabitants of the borough, or as free inhabitants of ancient tenements in the borough, and that Court therefore gave judgment for the plaintiffs.

The defendants appealed therefrom.

Muir Mackenzie (*Bullen,* with him), for the defendants. In the first place, the right of fishery in a navigable river is primâ facie in the Crown for the benefit of the subject: *Malcolmson* v. *O'Dea* (1); *Carter* v. *Muscot.* (2) And an oyster fishery is like any other fishery, and is governed by the same law: *Mayor of Orford* v. *Richardson* (3);

(1) 10 H. L. C. 618. — 9 Jur. N.S. 1135

(2) 4 Burr. 2162.

(3) 4 T. R. 437.

Mayor of Maldon v. *Woolvet* (1), and *Bagott* v. *Orr* (2). Secondly, the onus of shewing that the plaintiffs are possessed of a several fishery is on the plaintiffs who claim it. Thirdly, to shew that they are so possessed the plaintiffs must shew either an actual grant as early as Henry II., or evidence from which the Court will infer such a grant. Fourthly, there is no evidence of an actual grant to the plaintiffs or their predecessors, or if there ever was it was surrendered and never regranted. Several fishery must be mentioned in the grant, and no such general words as are in the charters produced are sufficient: Hall on the Seashore, 2nd ed. p. 20. The great case of the fishery of the river Banne, Ireland (3), and which is cited by Bayley, J., in the *Duke of Somerset* v. *Fogwell* (4); the case of *The Swans* (5) and *Mayor of Colchester* v. *Brooke.* (6) Fifthly, in the face of the user of the inhabitants, as stated in the 9th paragraph of the special case, there is no evidence from which a grant of a several oyster fishery to the plaintiff's can be presumed. Lastly, if a grant of a several fishery can be inferred, it was grant of such fishery sub modo, that is, subject to the right of the free inhabitants of ancient tenements to dredge without stint during the period from Candlemas to Easter Eve, or a grant to the mayor and corporation, but as regards such periods from Candlemas to Easter Eve in trust to permit the said free inhabitants to dredge without stint. Though inhabitants are too vague a body to have a grant to them, there may be such grant to the corporation in trust for them: *White* v. *Coleman* (7), and *Wright* v. *Hobert.* (8) That distinguishes the case from that of *Lord Rivers* v. *Adams* (9), which was relied on by the learned judges in the Court below.

A. Charles, Q.C. (*J. V. Austin,* with him), for the plaintiffs. There is ample evidence to justify the Court, who are to be at liberty to draw inferences of fact, in coming to the conclusion that a grant of the right of fishery such as is claimed by the plaintiffs in this case was made to their predecessors. The fact that the

(1) 12 Ad. & E. 13.

(2) 2 B. & P. 472.

(3) Dav. Rep. 55.

(4) 5 B. & C. 875, and at p. 885.

(5) 7 Rep. 82.

(6) 7 Q. B. 339.

(7) Freem. 135.

(8) 9 Mod. 65.

(9) 3 Ex. D. 361.

1881

CORPORATION OF SALTASH v. GOODMAN.

Royal charters produced are confirming charters, the language used in those charters and usage and acts which the plaintiffs and their predecessors are shown to have exercised, form together strong and sufficient evidence in support of the right being in the plaintiffs as claimed, and are inconsistent with there being any such right of fishery in any mere subject of the realm. The case of the *Duke of Beaufort* v. *Mayor, &c., of Swansea* (1) shews that modern acts of ownership are admissible to explain the meaning of ancient grants. The leases which have been granted and the other acts of ownership which have been exercised by the plaintiffs, as appears from the appendix to the special case, not only are such as would raise the presumption of a grant from the Crown prior to Magna Charta, but of such a grant as would be inconsistent with its having any such reservation in favour of the inhabitants as the defendants set up: *Mannall* v. *Fisher.* (2) The charters treat the right as an existing one, and if there be any distinction between oysters and floating fish it is one in favour of the plaintiffs, and either the word "waters" or "land" in the grant would be sufficient. The expression "tolls of oysters" in the grant of Queen Elizabeth can only be explained by the fact that the corporation had an oyster fishery, and so tolls of anchorage which occur also in that charter can only properly arise from or in respect of the propriety of the soil and is evidence of it: Hale de Portibus Maris; Hargreaves Law Tracts, p. 74. The decree in *Rudiard* v. *Porter* (3) being soon after the charter of Queen Elizabeth is an important evidence for the plaintiffs as shewing the rights then in the corporation. Then as to the last point raised by the defendants that the grant to the plaintiffs was a grant sub modo, it is really another mode of claiming as free inhabitants of ancient tenements, which it is admitted that they cannot do by prescription or custom: *Lord Rivers* v. *Adams.* (4) The Court however is asked by the defendants to presume an exception in the grant to the corporation in favour of the free inhabitants for a certain period of the year, which would tend to the destruction of the thing granted. It is impossible to presume the existence of any such exception, and the more so as it is inconsistent with all the acts which have been done by the plaintiffs and those claiming under them.

---

(1) 3 Ex. 413; 19 L. J. (Ex.) 97.

(2) 5 C. B. (N.S.) 856. 5 Am. R.S. 387

(3) In the appendix to the special case, and see statement of facts ante, p. 108.

(4) 3 Ex. D. 361.

Muir Mackenzie replied.

Cur. adv. vult.

April 1. BAGGALLAY, L.J. The plaintiffs in this action were incorporated by divers Royal charters granted in the reigns of Queen Elizabeth, King Charles II., and King George III., and they claim to be possessed, by virtue of such charters and by prescription, of the soil of certain portions of the river Thamer, and of a several oyster fishery therein. The defendants are free inhabitants of ancient tenements in the borough of Saltash; and the action was commenced in respect of a trespass alleged to have been committed by them on the 2nd of February, 1876, by breaking and entering the alleged fishery of the plaintiffs, and by catching and carrying away and converting to their own use divers of the oysters therein; by their statement of claim they claimed damages for the alleged trespass, and an injunction to restrain the defendants and their servants and workmen from repeating the acts complained of; the action having been so commenced, a special case was by consent stated for the opinion of the Common Pleas Division.

There is no question as to the limits of the several fishery claimed by the plaintiffs; they are set forth and described in the first part of the schedule to the special case; it is also admitted that the portion of the river Thamer in which the fishery is claimed is a navigable river, or arm or creek of the sea, in which the tide flows and reflows. The defendants admit the commission *in fact* of the several acts complained of by the plaintiffs; but they claim a right as subjects of the realm to dredge for and catch oysters within the aforesaid limits at all seasonable times of the year, and to carry away and dispose of for their own benefit by sale or otherwise, and without stint, the oysters which they may so catch; and, in the alternative, they claim a right as free inhabitants of ancient tenements in the borough of Saltash to dredge for and catch oysters within the aforesaid limits from Candlemas to Easter Eve in each year, and to dispose of the oysters which they may so catch. By their statement of defence the

1881

CORPORATION OF SALTASH
v.
GOODMAN.

Baggallay, L.J.

defendants made another alternative claim as free inhabitants of the borough, but this claim was not pressed, either in the Common Pleas Division or before us; and what we have now to determine is whether they are entitled in either of the two first-mentioned characters; if they are entitled in either of such characters, the defendants are entitled to judgment. Mr. Justice Grove and Mr. Justice Denman gave judgment in the Common Pleas Division in favour of the plaintiffs, and granted an injunction as asked for by them; from that decision the present appeal is brought.

I am of opinion that the appeal should be allowed; and though my colleagues think differently, and my opinion can consequently have no effect upon the decision of the question now under consideration, I am desirous of stating my reasons for the conclusion at which I have arrived. It being admitted that the portion of the river Thamer in which the several fishery is claimed by the plaintiffs is a navigable tidal river, their claim must be established either by proof of an actual grant by the Crown not later than the reign of King Henry II., or by evidence from which such a grant ought to be inferred; in the absence of such proof or evidence every subject of the realm must be deemed entitled to fish within the aforesaid limits. No restrictions were imposed by Magna Charta upon the right of the Crown to grant the soil of a navigable tidal river, and it left untouched all fisheries which had been made several by acts of the Crown not later than the reign of Henry II.; but it provided that the right of the public to fish in such rivers should not be barred by any act of the Crown later in date than the reign of that monarch. This was concisely but clearly stated by Willes, J., in answering the questions submitted to the judges by the House of Lords in the case of *Malcolmson* v. *O'Dea.* (1) He there said, "The soil of a navigable tidal river is primâ facie in the Crown, and the right of fishing therein is primâ facie in the public; but for Magna Charta the Crown could by its prerogative exclude the public from such primâ facie right, and grant the exclusive right of fishing to a private individual, either together with or distinct from the soil."

There is no suggestion in the present case of any actual grant of the several fishery which is now claimed by the plaintiffs; but it is contended on their behalf, that having regard to the terms of the before-mentioned charters and to the evidence of modern usage, by which the language of such charters may be explained, it may and ought to be inferred that a valid and sufficient grant of the several fishery was made to the free burgesses of Essa, by which name the town of Saltash was anciently known. Now, so far as can be gathered from the recitals in the charter of Queen Elizabeth, the charters of her royal predecessors amounted only to confirmations of the franchises and privileges granted by the earliest recited charter, that of Reginald de Vantort, by which, as recited in the charter of Queen Elizabeth, certain specified privileges were granted to the burgesses of Essa; but the privileges so recited to have been granted by Reginald de Vantort did not include a fishery of any kind, or any similar franchise or privilege. The charter of Queen Elizabeth is, however, much wider in its terms; for, after reciting and confirming the several earlier charters and the privileges thereunder enjoyed, it further recites that the burgesses of Essa from the time whereof the memory of man run not to the contrary, had held and enjoyed *divers other* customs, liberties, immunities, exemptions, and jurisdictions, as well *by prescription* as by reason and pretext of the aforesaid charters; and after incorporating the burgesses under the name of the mayor and free burgesses of the borough of Saltash, the queen granted to the said mayor and free burgesses that they thenceforth for ever might hold, use, and enjoy all the customs, liberties, privileges, franchises, and jurisdictions before recited or specified, and "also all other customs, liberties, privileges, immunities, acquittances, exemptions, profits, commodities, emoluments, and jurisdictions which the free burgesses of Essa, otherwise Saltash," "had theretofore lawfully held, used or enjoyed, or ought to have held, used or enjoyed by reason or pretext of any charter or letters patent by her the said queen, or any of her progenitors, kings of England, or by any other person soever theretofore in any wise made, granted, or confirmed, or by any other lawful means, right, custom, use, prescription, or title theretofore had and accustomed." The terms in which the customs, franchises, and privileges which had been previously enjoyed by the burgesses of Essa were thus confirmed to the mayor and free burgesses of

---

(1) 10 H. L. C. 618. 9 Jur NS. 1134

Saltash are very wide; and had the burgesses of Essa been previously lawfully possessed of a several oyster fishery in the river Thamer, the charter of the queen would, in my opinion, have been sufficient to confirm the right to the new corporation; but wide as is the language used, it is in no way suggestive that any such right had been previously enjoyed.

Our attention has been directed to the circumstance that by the same charter the queen granted to the new corporation divers lands, waters, privileges, and emoluments, including the passage or ferry of Saltash, tolls of oysters, tolls of the market, anchorage, and the customs to be taken for barges, boats, and seines of the sea, but such grant, unless operating by way of confirmation of some grant previous in date to Magna Charta, could not have had the effect of conferring upon the corporation a several oyster fishery in the navigable and tidal portion of the river Thamer. The language then of the charter of Queen Elizabeth being sufficient to confirm to the new corporation a several oyster fishery in the river Thamer, if such fishery had been previously enjoyed by the free burgesses of Essa, though such language is in no way suggestive of any such fishery having been so previously enjoyed, we have to consider the nature of the evidence of modern usage by which the generality and uncertainty of the language of the charter may be explained or supplied.

The case of the *Duke of Beaufort* v. *Mayor, &c., of Swansea* (1) well illustrates the class of cases in which, and the purposes for which, such evidence is admissible; a grant in the time of King John being of "terra de Gower" evidence of modern usage was admitted to explain of what "terra de Gower" consisted at the date of the grant. So in the present case, evidence of acts done by the plaintiffs, and of profits derived by them as apparent owners of the several fishery which they now claim, is admissible for the purpose of shewing that such several fishery was lawfully possessed and enjoyed by the burgesses of Essa previously to the charter of Queen Elizabeth, and was confirmed to the plaintiffs by such charter.

By the terms of the 6th and 7th paragraphs of the special case, the documents mentioned in the second schedule thereto and the minutes of the corporation set forth in the third schedule are to be taken as forming part of the case, and though some of these documents and minutes are not necessarily inconsistent with the rights asserted by the defendants, there are others which strongly support the claim made by the plaintiffs. I do not propose to examine these documents and minutes in detail; I content myself with observing that amongst those most favourable to the plaintiffs are a lease by the corporation dated as far back as the year 1680, of the sole privilege of dredging oysters; other leases of subsequent dates, down to a recent period, of a general right to dredge, though not expressed, to be exclusive; and several minutes of the receipt of money by way of rent for oysters, one of such minutes being dated in 1750, and others in 1804, and subsequent years. Giving a fair and reasonable effect to the evidence relied upon by the plaintiffs, I should be disposed to hold that it was sufficient to support their claim were it not for the admissions contained in the 9th paragraph of the special case. That paragraph is in the following terms. [The Lord Justice here read that paragraph.] Now, I fully assent to the proposition pressed upon us by the counsel for the plaintiffs that the defendants could not as free inhabitants of ancient tenements in the borough of Saltash support a claim based upon the immemorial but limited enjoyment described in the 9th paragraph of the special case; the soil of the river within the limits under consideration must, upon the admitted facts, be treated as vested in the corporation, and any such claim on the part of the defendants if set up *upon custom* must necessarily fail being for a profit in alieno solo; and any attempt to support it by prescription must prove unsuccessful by reason of the fluctuating character of the parties asserting it.

---

(1) 3 Ex. 413; 19 L. J. (Ex.) 97.

But though such a claim if made by the defendants could not be supported in law, the immemorial enjoyment upon which it is based is, in my opinion, sufficient to defeat the claim of the corporation to a several fishery; the exercise by the free inhabitants of ancient tenements, from time immemorial and without interruption by those who, it is now asserted, had at all times a right to interrupt them, of the privilege described in the 9th paragraph of the special case is, in my opinion, inconsistent with any such exclusive right of fishing as, it is alleged by the plaintiffs, is evidenced by modern usage, and which it is essential for them to prove in order to establish their alleged claim by prescription. Whether such an exercise by the free inhabitants of ancient tenements can be treated as consistent with a modified right in the plaintiffs is a question which I will presently consider, but unless such modified right can be supported, it would follow that, upon the rejection of the plaintiffs' claim by reason of its not being supported by evidence from which a valid grant of a several fishery can be inferred, the claim of the defendants in their character of subjects of the realm, which is a claim based not upon custom or prescription, but upon the right secured to them by Magna Charta must prevail.

It has been suggested, rather than contended before us, though the argument was pressed in the Common Pleas Division, that the right of the subject to fish in a navigable tidal river is confined to *floating* fish, and does not extend to oysters, which it is alleged are part of the soil, or, at any rate, are so far attached to it that they cannot be removed without to some extent disturbing the soil, and that the soil of the Thamer being vested in the plaintiffs the dredging by the defendants was a trespass in respect of the plaintiffs' ownership of the soil. But this argument is, in my opinion, untenable, having regard to the decision in *Bagott* v. *Orr* (1) in which it was in substance held that the fishing for *shell fish* in a navigable river was within the rights of the subjects of the realm though there might be a question as to the removal of shells only.

It has also been urged upon us that a usage to dredge oysters without stint is unreasonable and destructive of the fishery itself, and that this circumstance alone is sufficient to defeat the defendant's claim; it would doubtless be a very serious obstacle in their way if they were claiming by custom or prescription, but I do not regard it as of any force in respect of their claim as subjects of the realm. Magna Charta imposes no restriction upon the extent to which the public may exercise the right of fishing in a navigable river, nor am I aware that any of the statutes passed for the protection of oyster fisheries impose any other restrictions than with reference to the periods of the year during which the fishery may be carried on, and the size of the oysters which may be taken; these regulations must of course be observed; if they are not sufficient to protect what may be deemed a necessary supply, it is open to the legislature to make adequate general or local provision for the purpose.

---

(1) 2 B. & P. 472.

On the other hand it has been contended on behalf of the defendants, that all the privileges of the corporation were surrendered into the hands of the sovereign in the reign of Charles II., and were never regranted, but I am unable to take this view of the second charter of that sovereign; it is not disputed, that if a grant of a several fishery had been made in or previously to the reign of Henry II., and if such several fishery had been surrendered, it could have been regranted; and when we turn to the charter we find a recital of the intention of the king to regrant whatever had been surrendered, the surrender having been made for the purpose only of removing certain doubts which had arisen as to the election of mayors and the officers of the corporation; the surrender and regrant were contemporaneous acts, and the language of the operative part of the charter is in my opinion sufficient to regrant all such franchises and privileges as had been previously enjoyed, and had been surrendered for the recited purpose. Upon the question, whether a modified right in the plaintiffs to the oyster fishery in the river Thamer could be supported, we had an ingenious and able argument addressed to us by Mr. Muir Mackenzie; he contended that the evidence adduced on the part of the plaintiffs taken in connection with the admissions in paragraph 9 of the special case, raised an inference of a grant of a several fishery to the plaintiffs throughout the whole year, with the exception of the interval from Candlemas to Easter Eve, or else with an obligation imposed upon them, if grantees for the whole year, to permit the inhabitants of ancient tenements within the borough to dredge for oysters during such period. In support of this contention Mr. Mackenzie referred to the cases of *White* v. *Coleman* (1) and *Wright* v. *Hobert.* (2) In the former case, which was an action of trespass for taking two mares in B., the defendant pleaded that the king was seised of B., and that he, the defendant, took them damage feasant as bailiff to the king, the plaintiff replied that he was an inhabitant of C., and that the mayor and burgesses of C. had common of estovers of turves *for them and for every inhabitant to burn in quibuslibet messuagiis suis.* To this the defendant demurred, and the effect of the decision of the Court appears to have been that, though inhabitants could not prescribe for common in their own names, they might be capable of the benefit of such a prescription, and that the mayor and burgesses might prescribe for themselves and the inhabitants. It was also held that by virtue of such prescription, the inhabitants of new, as well as those of ancient buildings should have estovers. In *Wright* v. *Hobert* (2) a piece of land containing forty acres was formerly the inheritance of two persons, who, several hundred years before the reign of George I. conveyed the same to the use of themselves and the survivor for life, and after the decease of the survivor to the use and intent that as many of the inhabitants as were able to buy three cows, might put them there to grass in the daytime, from the first Monday in May to the 1st of August for ever, and from that day to be in common for all the inhabitants there until Lady Day following, and then to be enclosed for raising the grass until the first Monday in May for ever. A decree was made by Lord Macclesfield in accordance with the terms of the grant, which though at first supposed to be lost was subsequently found. In giving judgment Lord Macclesfield said that if this claim had been by prescription, no person but the inhabitants of ancient messuages would be entitled to it.

---

(1) Freem. 135.

(2) 9 Mod. 65.

I do not propose to express any assent to or dissent from the argument so advanced by Mr. Muir Mackenzie, as the pleadings in the present action are not so framed as to admit of the determination of what would be in effect a question between her Majesty's subjects at large and a particular class of them, whether composed of all the free inhabitants of the borough of Saltash or of the free inhabitants of ancient tenements only. I have already said that if the views so pressed by him cannot be adopted, every subject in the realm has in my opinion a right to do such acts as those complained of in the present action; if they are adopted, the free inhabitants of ancient tenements are alone so

---

(1) 9 Mod. 65.

entitled; in either view the defendants would be entitled to judgment.

Brett, L.J. I think this is a case of considerable difficulty, and is especially so from the way the special case has been framed. The questions stated in that case are, first, whether the defendants as subjects of the realm are entitled to dredge for oysters between the 2nd of February and Easter Eve, both inclusive. Secondly, whether the defendants are entitled to the same rights as free inhabitants of ancient tenements in the said borough; and, thirdly, whether the defendants are entitled to the same rights as free inhabitants of the said borough. Then the decision of the Court is asked in this form: "If the Court should be of opinion that the defendants are not so entitled judgment is to be entered for the plaintiffs." So that upon the statement of the case the burden is upon the defendants, that is to say, that unless the defendants make out their right in one of those three forms, the judgment is to be entered for the plaintiffs. But, then, it is said that unless the plaintiffs can shew a grant to themselves of a several fishery which ousts the supposed right of the defendants, the defendants are entitled as subjects of the realm; and that probably is true. Mr. Muir Mackenzie propounded several propositions. He said the right of fishery in a navigable tidal river is primâ facie in the Crown for the benefit of the subject. To that I agree. He said the onus of shewing they are possessed of a several fishery lies on the plaintiffs. To that I agree. Further, he said they must shew either an actual grant as early as Henry II. or evidence from which the Court will infer such a grant. I agree to that. Next he said no actual grant has been produced, and if there ever was an actual grant, it was in fact surrendered; and lastly, that from the evidence in the schedule no grant should be inferred, or else a grant of a several fishery to the plaintiffs except for the forty days of Lent, or as regards this period in trust to permit such inhabitants as the defendants to dredge without stint.

Now, it seems to me the real questions are whether there was any evidence of an actual grant to the plaintiffs, or from which such a grant ought to be inferred, and whether, assuming that there was, it can be properly inferred to be a grant of this nature, that is, a grant to the plaintiffs except for the forty days, or as regards this period of forty days in trust to permit such persons as the defendants to dredge without stint.

Now, as to the question of whether there was evidence of a grant or from which a grant ought to be inferred, it was said on the part of the defendants that the words of the documents which have been put in evidence do not contain an actual grant, and in my opinion they do not, but it seems to me that what they really do import, and that in the clearest terms, is, that within the proper time, that is as early as Henry II., there existed a grant to the predecessors of the plaintiffs. If there was a grant of a several fishery, that of itself seems to me to shew that there cannot be an existing right at common law in the subjects of the realm generally. Although the question of whether there was or not a grant of a several fishery to the plaintiffs so as to oust the right of the general public was strongly argued in the Court below, yet Mr. Mackenzie did not rely much upon that, when he argued before us, but practically gave it up, and feeling the force of the judgment in the Court below he brought out a new argument, and one of extreme ingenuity, which was to turn the argument in the Court below and support the defendants' claim. Now, that is the argument which is contained in Mr. Mackenzie's two last propositions. He did not with any persistence contend that the defendants could claim by way of custom. Nor did he contend they could claim by way of prescription. They certainly could not. I do not think he strongly maintained they could have this right as part of the general public, and it seems to me for the reason I have already given that they could not. There was a grant, and the only question we have to decide is whether that grant was in the form which Mr. Mackenzie has contended for in favour of the defendants. Now, inasmuch as the grant itself is not before us, and as the documents in evidence only prove that there was a grant to the predecessors of the plaintiffs without shewing what was its form, we have to infer what was its form from the user. Now that user on the part of the plaintiffs has been shewn by producing a long series of documents which have been acted upon, the most satisfactory kind of evidence that can be, not depending upon assertions of exercise of rights proved by the recollection of people, but by actual documents which must carry their own construction. Now, a great part of those documents consist of leases granted by the corporation to lessees of an absolute separate fishery. If the proposition contended for by Mr. Mackenzie be correct, the lessees under those leases, whenever this alleged right by the fishermen was exercised, if it existed, as a right, would have been entitled to have had an action against the corporation for granting leases which they had no right to grant. It could not have failed to have been disputed. But there is no evidence of any such dispute between the corporation and their lessees. It seems to me therefore that the fact of those leases is the strongest evidence of user by the corporation, of the right of several fishery without any diminution. But then it is said that the 9th paragraph of the special case must be taken into consideration as if it were a fact, and so it must. The question is, whether that modifies the user which is proved by the corporation. We are asked to infer from that 9th paragraph, taken in conjunction with such user, that the original grant was a grant to the corporation of a several fishery, except during the forty days of Lent, during which period the right of the corporation to take any fish must be considered to entirely cease, because it is said that during that time the inhabitants of free tenements had a right to fish without stint. A very extraordinary thing to infer. A grant such as was never known in the law of England; still it is possible that there might be such a grant; but then this user alleged in the 9th paragraph is wholly inconsistent with the user which is proved on the part of the corporation, and one must therefore consider how one must deal with such a statement as that in the 9th paragraph of this case.

Now, one way of dealing with it is, if it can be fairly done, to construe it as a fact existing consistent with the user which is established on the part of the plaintiffs. If, however, it be inconsistent with the other statements in the special case, which include as they do all the documents, the others, to my mind, so strongly prevail, that it seems to me we should be bound to overrule that statement in the 9th paragraph. But I think that it can be construed consistently with all the allegations in the other parts of the case. I think it is true in fact, but that it does not make out the case of the defendants. It says, "The free inhabitants of ancient tenements in the borough of Saltash have, from time immemorial, without interruption and claiming as of right"—that is, they themselves insisting they have the right—"exercised the privilege of dredging for oysters in the locus in quo mentioned in the statement of claim from the 2nd day of February in each year to Easter Eve in each year, both inclusive, and of catching and carrying away the same without stint for sale or otherwise." It seems to me that that is not inconsistent with this, that they have from time immemorial exercised and insisted upon the right but not in such a form that it challenged the corporation to interfere with it. If that be true, it is not a user which is inconsistent with the rights of the plaintiffs. With the greatest deference to my Brother Baggallay, the two cases he has cited seem to me not to be in point. Regretting, as I do, the difference that arises between me and him, I am of opinion that the evidence shews a grant of a several fishery to the plaintiffs, and that it does not shew a grant of the nature which was so ingeniously advanced by Mr. Mackenzie, and that therefore the plaintiffs are entitled to succeed, and the judgment given for them was right.

COTTON, L.J. I also am of opinion that the judgment appealed from should be affirmed.

The first question, no doubt, is, whether the plaintiffs have made out any title. And, first, I will consider whether, apart from the acts of the defendants and those of the same condition as mentioned in paragraph 9 of the special case, the plaintiffs have made out the right they claim. Secondly, whether the acts mentioned in that paragraph prevent the plaintiffs from having that right. No doubt, if they have a right it must originate in a grant from the Crown at an early date, and no such grant has been produced by the corporation, but there are references to certain rights and privileges in the grants produced (I will not go through them, as Lord Justice Baggallay has already done so) which are capable of being explained by modern usage, and, therefore, if there is modern usage to the effect that the corporation has as of right claimed to exercise rights and privileges which shew they are entitled to a several fishery, that would, in my opinion, be evidence of there having been a grant to the corporation of a right to a several fishery. As to this part of the case there is no difference between any members of the Court, and it is sufficient to say that there had been for a long period of years leases granted by the corporation of the right to dredge for oysters during the entire year, and some of the old leases mentioning it as a sole privilege to dredge for oysters, and there are entries in the books of their officers which are set out in the schedule which mention the receipt of rent for the whole year, and there is one entry in particular to which I refer which is as follows: "To cash received from different persons for permission to put their oysters upon the ground during Lent of this year." So that there are leases granted of the exclusive right to dredge for oysters during the entire year, and acts of ownership over the oyster beds during the period of Lent.

Now one must consider the effect of the acts of the defendants, and in doing so I am considering, not whether the defendants have claimed any right under any special modified term of the grant to the plaintiffs, but whether the plaintiffs have any right at all in a several fishery. Primâ facie, if they have a grant of it it will be for the entire year without any exception, and if they have no such grant the right will be in the Crown for all the subjects of the realm, to be used at all reasonable times of the year. Now the acts of the defendants relied upon are the acts of a limited portion of the public during a limited period of the year only, and, in my opinion, therefore, irrespective of the question whether the defendants can make out any right in themselves during the period of Lent, the acts of the defendants are not sufficient to prevent us from concluding, as we all should otherwise do, that there was a grant to the corporation of this several fishery. But then comes the question, whether, although the plaintiffs may have a right, the defendants have also established their right. It was not argued before us that the defendants could maintain their claim by way of custom or by prescription, and I think rightly. What was urged before us was this, that we must consider there was an exception of the period of Lent in the grant to the corporation, or that during that period there was a trust declared for the inhabitants of the borough. In the first place, that is entirely inconsistent not merely with what is alleged by the pleadings, but with the statement in the special case that the defendants contend that the soil of the Thamer and the several oyster fishery, if any, are vested in the Crown or Duchy of Cornwall. However, can the defendants establish either of the grounds which they have suggested? First, an exception from the grant to the corporation during the period of Lent, so that during that period the common law would be left to have its effect. In my opinion, that is inconsistent with what it is contended has been proved, namely, that a certain portion only of the public, viz., the free inhabitants, and not all the subjects of the realm, have exercised their rights during that period. If there was an exception to them of such a right to fish and dredge for oysters without stint, it would be destructive of the right of the corporation, and in my opinion, it is impossible to hold there was an exception of a right given to any one in the borough destructive of the previous grant to the corporation. Then it was suggested that it must be presumed that the corporation were trustees during this period for the inhabitants. In my opinion, that is not to be presumed. One must remember that what the defendants insist upon in the special case is that this several fishery was not in the corporation at all either as trustees or otherwise, but remained either in the Crown or in the Duchy of Cornwall; and that what the defendants claim is a right to dredge without stint and without any control, and which, in my opinion, is inconsistent with the leases and the grant of the exclusive right during the whole year to the lessees of the corporation, and the receipt of money from persons applying to the corporation for the liberty of putting down oysters in these oyster beds during Lent. It is impossible to suppose that, if there had been this trusteeship or this exception in favour of the inhabitants, leases would have been granted in the terms they have been granted, or that the corporation would have dealt as they have dealt with the oyster beds during the period of Lent. As regards the two cases of *White* v. *Coleman* (1) and *Wright* v. *Hobert* (2), they do not, I think, assist the contention of the defendants. In the former of these cases there was a corporation

---

(1) Freem. 135.

(2) 9 Mod. 65.

1881

CORPORATION OF SALTASH v. GOODMAN.

Cotton, L.J.

who had obtained by prescription a right of common, and it was held that they were trustees for the inhabitants of the borough, who relied on the title of the corporation in support of their doing the acts complained of. In the other case of *Wright* v. *Hobert* (1) there was an express trust reserving certain rights to the inhabitants of a particular locality during a certain period of the year, which is a very different case from the present one. In the absence of any trust-deeds, or anything from which we could safely presume such a trust, the defendants have failed I think to make out the grounds on which they sought to maintain their right, and, therefore, in my opinion, this appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiffs: *N. Bennett.*
Solicitors for defendants: *Wedlake & Letts.*

W. P.

CAVE *v.* HASTINGS.

June 3.

20 Ch D 91

Statute of Frauds, s. 4—Memorandum in Writing—Reference to Document containing Terms of Agreement.

The plaintiff had signed a memorandum setting forth the terms of a contract by which the plaintiff agreed to let a carriage to the defendant for the period of a year. The defendant in a subsequent letter to the plaintiff signed by him referred to "our arrangement for the hire of your carriage."

There was no other arrangement for the hire of a carriage than that the terms of which were contained in the memorandum signed by the plaintiff:—

Held, that the defendant's letter sufficiently referred to the document containing the terms of the contract, to constitute a good memorandum of the contract within the Statute of Frauds, s. 4.

Action for breach of an agreement to hire a carriage for the term of one year from the 1st of January, 1880.

The statement of defence (inter alia) relied upon the absence of any sufficient memorandum in writing of the contract under the Statute of Frauds.

At the trial before Lopes, J., it appeared that the terms of the contract actually made were contained in a memorandum dated the 1st of December, 1879, and signed by the plaintiff, but not by the defendant, which was as follows: "I hereby agree to provide you with a Victoria (selected), horse, harness, and a coachman, to your satisfaction for one year from the 1st of January, 1880, for the sum of 18*l.* 10*s.* per month, occasionally in wet weather the use of a brougham."

---

(1) 9 Mod. 65.

A carriage was supplied by the plaintiff in accordance with the terms of the agreement which the defendant made use of, and paid for, during the period of two months, but the defendant then refused to keep the carriage any longer. On the 11th of February the defendant wrote to the plaintiff as follows: "You no doubt remember that it was agreed at our interview on 28th of January, that our arrangement as to the hiring of your carriage was at an end, and that you were not to send to me after the end of this month. I now find that I can dispense with your services after this week, and shall be glad to know what deduction you feel inclined to make from my monthly payment if I agree to give you your carriage on Saturday next." This letter was signed by the defendant.

The defendant admitted that he did refer in this letter to the arrangement, the terms of which were contained in the memorandum of the 1st of December, and it was proved that there was no other arrangement with reference to the hire of a carriage. The jury, in answer to questions left them by the learned judge, found that there was no rescission of the agreement, and assessed the amount of damages at 25*l.* The learned judge did not give judgment, and the case was set down on motion for judgment by the plaintiff.

May 23. *C. C. Scott*, for the plaintiff, moved for judgment. It is contended that the memorandum signed by the plaintiff, and the letter of the 11th of February, signed by the defendant, taken together, constitute a sufficient memorandum of the contract. The latter plainly refers to and incorporates the former without the need of parol evidence to connect the two, or if parol evidence be needed the decisions shew that parol evidence is admissible for the purpose of identifying the "arrangement" referred to by the letter of the 11th of February with the memorandum of the

1st of December. [He cited *Ridgway* v. *Wharton* (1); *Baumann* v. *James* (2); *Long* v. *Millar* (3); *Boydell* v. *Drummond* (4); *Buxton* v. *Rust* (5).]

Gully, Q.C., and *Frith*, for the defendant, shewed cause. The connection between the two documents must appear without parol evidence. It is contended that the document signed by the defendant, if it does not contain the terms of the contract, must refer on the face of it to some other written document that does. Non constat on the face of the letter that there was not some other and different parol arrangement with regard to the hire of the carriage. To hold that there is here a sufficient memorandum would let in the very mischief that the statute was intended to prevent. [They cited *Sykes* v. *Dixon*. (6)]

Cur. adv. vult.

June 3. The judgment of the Court (Field and Bowen, JJ.) was delivered by

FIELD, J. This was an action tried before Lopes, J., who did not give judgment, and the question argued before us on motion for judgment was whether there was a sufficient memorandum of the contract upon which the action was brought within the 4th section of the Statute of Frauds. It is clear that there was an agreement in fact for the hire of a carriage for a year upon the terms contained in the memorandum of the 1st of December, 1879, and that that memorandum was signed by the plaintiff in such a manner as to be binding upon him. The plaintiff supplied a carriage in accordance with the memorandum, and on the 28th of January there was an interview between the plaintiff and defendant, and something took place at the interview which induced the defendant to send the letter of the 11th of February, which refers to "our arrangement as to the hiring of your carriage" and to "my monthly payment." It being clear that there was in point of fact an agreement which was not rescinded, the only defence now in question is based on the contention that the defendant had signed no memorandum in writing of the contract. It has long been established that the whole of the agreement need not appear on one document, but the agreement may be made out from several documents. The only document in this case that was signed by the defendant was the letter of the 11th of February, which does not in itself contain the terms of the contract. Now I adopt the statement of the law on this subject contained in *Dobell* v. *Hutchinson.* (1) Lord Denman, C.J., there says:—"The cases on this subject are not at first sight uniform; but on examination it will be found that they establish this principle, that when a contract in writing or note exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them." The letter in this case refers to "our arrangement." It was argued that that might refer to some other and different parol arrangement; but it seems to us that this reference to the former document is sufficient, in accordance with the principle laid down in *Ridgway* v. *Wharton.* (2) In that case "instructions" were referred to, and it was held that parol evidence might be given to identify the instructions referred to with certain instructions in writing. The case of *Baumann* v. *James* (3) is an application of the same principle. The decision in *Long* v. *Millar* (4) carries the application of the principle still further. An illustration given by Bramwell, L.J., in that case exactly fits the present case, as it seems to me. He says:—"I may further illustrate my view by putting the following case: suppose that A. writes to B. saying that he will give 1000*l.* for B.'s estate, and at the same time states the terms in detail, and suppose that B. simply writes back in return, 'I accept your offer.' In that case there may be an identification of the documents by parol evidence, and it may be shewn that the offer alluded to by B. is that made by A. without infringing the Statute of Frauds, s. 4, which requires a note or memorandum in writing." Such being the principle, do the terms of the letter of 11th of February sufficiently refer to the previous memorandum signed by the plaintiff? Putting aside the admission

---

(1) 6 H. L. C. 238; 27 L. J. (Ch.) 46. 4 Jur NS 173.

(2) Law Rep. 3 Ch. App. 508.

(3) 4 C. P. D. 450.

(4) 11 East. 142.

(5) Law Rep. 7 Ex. Ch. 1, 279.

(6) 9 A. & E. 693.

(1) 3 A. & E. 355.

(2) 6 H. L. C. 238. 4 Jur NS 173

(3) Law Rep. 3 Ch. App. 508.

(4) 4 C. P. D. 450.

of the defendant that he did intend to refer to the agreement, the terms of which were contained in that memorandum, it was shewn conclusively that there was no other arrangement to which he could have intended to refer, and under these circumstances it seems to me clear that, according to the principle laid down in the cases to which I have referred, the letter of the 11th of February did sufficiently refer to a document containing the terms of the contract. For these reasons our judgment must be for the plaintiff.

Judgment for the plaintiff.

Solicitor for plaintiff: *C. J. C. Ridham.*
Solicitors for defendant: *Foss & Legg.*

E. L.

[IN THE COURT OF APPEAL.]

June 20.

AKERBLOM *v.* PRICE, POTTER, WALKER, & CO.

Ship—Pilot—Salvage.

When a pilot has assisted in navigating a vessel from a dangerous situation to a safe anchorage, the test, whether he is entitled to be remunerated for salvage services, is not, on the one hand, whether the vessel was at the time of succour in distress, or, on the other hand, whether she was then damaged; but the test is whether the risk attending the services to the vessel was such, that the pilot could not be reasonably expected to perform them for the ordinary pilot's fees, or even for extraordinary pilotage reward.

A vessel was, during a heavy storm, being driven to leeward towards dangerous sands: her captain was ignorant of the locality, and her loss appeared almost inevitable: some pilots, seeing her danger, put off to sea at the peril of their lives in order to assist her; they were unable to board her by reason of the height of the sea: but by preceding her and signalling to her, they guided her to a safe anchorage. The vessel had sustained no damage:—

Held, that the pilots were entitled to be remunerated for salvage services.

Action to recover the sum of 48*l.* 18*s.* 1*d.*, being the cargo's share of the sum of 100*l.*, paid by the plaintiff for salvage of the ship *Ailo* and cargo, and salvage services rendered to the ship and cargo.

The facts and the arguments are sufficiently stated in the judgment of the Court.

May 9. *Day, Q.C.*, and *Pollard*, for the plaintiff.

H. Matthews, Q.C., and *Ashton Cross*, for the defendants.

In addition to the cases mentioned in the judgment, the following authorities were cited during the argument: *The Joseph Harvey* (1); *The Æolus* (2); *The Jonge Andries* (3); *The Anders Knape.* (4)

Cur. adv. vult.

June 20. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.), was delivered by

BRETT, L.J. In this action brought by the plaintiff, as shipowner, to recover from the defendants, as assignees of cargo, a general average contribution, the question in dispute was reduced to be whether a sum of 100*l.*, paid by the plaintiff to certain pilots, could be legally treated by the plaintiff as against the defendants as a payment for salvage services, or whether the plaintiff as against the defendants was entitled to say no more than that the payment was for services, which, however meritorious, were only pilotage services. If the first case were made out, the plaintiff would be entitled to succeed; if the second, the whole payment must be borne by the plaintiff as the shipowner, and the defendants would be entitled to succeed. The case was tried before Pollock, B., and a special jury. Two questions were left to the jury, with one only of which it is necessary to deal. The jury found that the services were only pilotage services. Upon a rule for a new trial on the ground of misdirection and as for a verdict against evidence, the Divisional Court made the rule absolute. The appeal is against that order. Upon the hearing, it appearing to us that we had all the materials before us upon which to decide the case, that is to say, that we had all the evidence of direct facts before us, and that there remained only the question of what inferential fact ought to be drawn from those facts, we considered ourselves bound to go further than the Divisional Court, and to order that the verdict for the defendants should be set aside, and judgment should be entered for the plaintiff without another trial.

---

(1) 1 Ch. Rob. 306.

(2) Law Rep. 4 A. & E. 29

(3) Swa. Adm. Rep. 226,

(4) 4 P. D. 213.

The facts proved beyond controversy were that the vessel, bound for Barrow-in-Furness, was by the violence of the wind and sea driven to leeward of her port into Morecambe Bay; that by reason of the same violence of wind and sea, the vessel could not beat to windward so as to make her port or even remain where she was, but was being driven more and more to leeward towards dangerous sands; that her captain and crew were ignorant of the locality; that the vessel, unless guided to some part of the bay in which she might take the ground or lie in comparative safety, must almost inevitably have been lost; that the pilots, seeing her peril, put to sea from harbour in order to assist her; that by going to sea in such a storm they ran no inconsiderable danger of losing their own vessel and their lives; that being unable, by reason of the height of the sea, to board the vessel, they led her, by preceding her and signalling to her, to a safe anchorage in the bay; that, (and it is a strong indication of the opinion of all present of the urgency of the position,) no mention was made from the vessel or by the pilots of any port to which the vessel should be steered. The vessel had a pilot signal flying when the pilots put off and when they approached the vessel; and the vessel had not suffered any damage to her hull, spars, or sails.

Upon these practically undisputed facts, it was argued for the plaintiff that the jury ought in reason to have found for him, on the ground that the ship was in distress, and that from that fact alone when it exists, however great or small the distress, pilots are not bound to render any service to a ship except upon the terms of receiving salvage reward, and that the pilots in this case had not agreed to render services on any other terms. It was argued for the defendants that the jury were entitled and even bound to find for them, because the vessel was not herself damaged; and that unless a ship be herself damaged, pilots are bound to serve her on request as pilots; and, if they do serve her, are entitled to be paid only for pilotage service. Cases were cited from the Admiralty Reports on behalf of the plaintiff in order to support in its entirety the proposition enunciated for him. These cases were criticised on behalf of the defendants, in order to shew that in all of them there was in fact some damage to the ship itself, besides its being otherwise in distress. It cannot be denied that the terms used by Dr. Lushington in *The Frederick* (1) and *The Eliza* (2), and several other cases, if accepted literally, support the plaintiff's view. Equally it cannot be denied that the criticism on them made on behalf of the defendants is, in fact, correct. The difficulty of dealing with Admiralty Reports by way of authority is, that there is no necessity in that Court that the judge should, in the exposition of the grounds of his judgment, discriminate strictly between the proposition of law which is to be satisfied by all the facts of the case, and the rule of interpretation of the direct facts of maritime vicissitudes given in evidence, by which he desires to bind himself and his successors as to the inference of fact he and they ought, as a general rule, to draw from those facts. The latter use of authority is inapplicable as such to a trial by jury, because a jury does not disclose the reason why its members have drawn any particular inference of fact. A jury may be well assisted by having the reasoning of great judges of the Admiralty Court explained to them. Upon careful consideration, we cannot adopt as a rule of law, or as a proper rule for drawing an inference of fact, the abrupt rule suggested for the defendants. And the rule enunciated by Dr. Lushington requires to be divided into its elements of law and fact, before it can be applied to a trial by jury. The fundamental rule of administration of maritime law in all courts of maritime jurisdiction is that, whenever the Court is called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the Court will try to discover what in the widest sense of the terms is under the particular circumstances of the particular case fair and just between the parties. If the parties have made no agreement, the Court will decide primarily what is fair and just. The rule cannot be laid down in less large terms because of the endless variety of circumstances which constitute maritime casualties. They do not, as it were, arrange themselves into classes, of which à priori rules can be predicated. If the parties have made an agreement, the Court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it and decree what is fair and just. This is the great fundamental rule. In order to apply it to particular instances, the Court will consider what fair and reasonable persons in the position of the parties respectively would do or ought to have done under the circumstances. In the case, therefore, of pilots claiming salvage reward, the ultimate proposition with regard to the pilots to be determined by the tribunal, which has to decide between the pilot and shipowner, is, would a fair and reasonable owner and a fair and reasonable pilot, if they had had to agree, have agreed under the circumstances that the services to be performed should be performed for ordinary pilotage fees, or even extraordinary pilotage reward, or for salvage reward? would a fair owner have insisted on requiring the necessary services for ordinary pilotage fees, or even a higher rate of pilotage payment? would a fair pilot have refused to perform the necessary services unless upon the terms of a salvage reward? In such a dispute to be determined by a judge and jury, these besides the question of the position of the ship are the questions to be left to the jury. In this case, for instance, the questions for the jury were: was the ship in a position of imminent danger of being lost? was she saved from such danger by the acts of the pilots? were the acts of the pilots, by reason of the weather and the position of the ship, made so different in danger or responsibility from the ordinary acts of service of pilots, as that no fair and reasonable owner would have insisted on requiring such service for other than salvage reward? In a dispute to be determined by a judge, in a Court of Admiralty or otherwise, these are the propositions, which are to be applied to the particular facts of the case. It follows that there can be no such rigid rule of law, or of interpretation of facts, as is suggested on behalf of the defendants. It follows that the meaning of the phrase "in distress," used by Dr. Lushington, is not to be interpreted in the rigid manner suggested on behalf of the plaintiff. Suppose a ship previously reduced by accident to such a stage of unseaworthiness as makes it expedient or necessary that she should enter a port of refuge, as by a leak or the loss of a mast, is approaching such port in moderate weather, and so that she can enter it, if steered a right course, with ease, notwithstanding the damage done to her: can it be pretended that it would be reasonable and just, within the tests above enunciated, that a pilot conducting her into port should be treated as a salvor? yet she would be an unseaworthy ship, a damaged ship, a disabled ship, and in a sense a ship "in distress." Suppose, on the other hand, the ship, as a ship, to be intact, no damage to hull, spars, or sails, but driven by the most violent weather, without power of resistance, within half a mile of an iron-bound leeward coast, with no possibility of escape from immediate total destruction, but by entry into a narrow, and to the crew, unknown haven of the coast; and suppose the weather and position to be such that with all the knowledge and skill of the best pilot, there would still be the greatest danger that he and the ship might be lost: could any fair person say that a fair master would ask a pilot to come on board and assume such a responsibility and risk, or consider that, being on board, he should exercise such a responsible duty and run such a risk as has unexpectedly arisen, for any other than salvage reward? These hypothetical cases shew that it is not the mere fact of injury to the hull, masts, or sails of the ship which is to govern, but that the tribunal must determine, whether under all the circumstances of the particular case the service, which the pilot has entered upon or has unexpectedly found imposed upon him, was rendered so different in responsibility or danger or kind from the ordinary service of a pilot, as to make it impossible that any fair owner should have insisted upon his being paid otherwise than by a salvage reward; or, whether, although there was some increased responsibility or danger or unusual kind of service, any fair pilot would have refused to enter upon the service or to continue to perform the service, unless paid otherwise than by a fair compensation for pilotage services. That a pilotage service may be turned by supervening casualties into a service to be compensated by salvage reward, is thus laid down by Dr. Lushington: "The law I have laid down in more than one instance upon this point is, that if, in the performance of a contract of towage, an unforeseen and extraordinary peril arise to the vessel towed, the steamer is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance; and therefore is entitled to salvage reward. I am of opinion that these rights and obligations incident to a contract of towage are implied by law, and that the law thereby secures equity to both parties and the true interests of the owners of ships. A similar law holds with respect to a pilot. On certain emergencies occurring, which require extraordinary service, he is bound to stay by the ship, but becomes entitled to salvage remuneration, and not a mere pilotage fee": *The Saratoga.* (1) It must be remembered that in order to found a claim for salvage reward, it is absolutely essential that the ship should be in imminent danger of being lost, and should by the service be saved from such danger. It may be said therefore, and we think would be truly said, in fact in almost every, if not in every case, that whenever the ship is in such danger, the service of the pilot must necessarily be different in kind, responsibility, or danger from the ordinary service of a pilot. That, however, is a different proposition from either the one suggested for the plaintiff or that suggested for the defendants. It is consistent with the view that the true interpretation of the phrase used by Dr. Lushington is that the ship must be not merely in distress in a general sense, but in such distress as to alter the service of the pilot to the extent above suggested. It leaves the rule of law to be that in order to entitle a pilot to salvage reward he must not only shew that the ship was in some sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward. It seems to us perfectly clear that the services of the pilots in this case were within the rule thus laid down, and that the payment to them ought to be considered as between the plaintiff and defendants as a payment of salvage reward.

---

(1) 1 Wm. Rob. 17.

(2) Lush. Adm. 536.

We have thought it right to give our reasons at length, but we might decide this case by saying that the service rendered was one which the pilots were not bound to render; it was a danger they were not bound to encounter: next, that the service was not one of pilotage: it was not a piloting to any port or place, but a taking out, a salving, from danger.

---

(1) Lush. Adm. 318, at p. 321.

Judgment for the plaintiff.

Solicitor for plaintiff: *Robert Greening.*

Solicitors for defendants: *Norris, Allens, & Carter, agents for Simpson & North, Liverpool.*

J. E. H.

June 3.

CHAPMAN (SURVEYOR OF TAXES), APPELLANT; ROYAL BANK OF SCOTLAND, RESPONDENTS.

*Revenue—Inhabited House Duty—House, Definition of—Dwelling-house let in different Tenements—*41 *Vict. c.* 15, *s.* 13—*Necessity of structural severance—Occupation of Part by Landlord—*57 *Geo.* 3, *c.* 25.

8 QBD 423

The statute 41 Vict. c. 15, s. 13, sub-s. 1, provides that, when any house being one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing at any time during the year of assessment to the surveyor of taxes stating therein the facts, and after the receipt of such notice by the surveyor the Commissioners acting in the execution of the Acts relating to the inhabited house duties shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed if it had been a house comprising only the tenements other than such as are occupied as aforesaid or are unoccupied:—

Held, that the provisions of the sub-section only apply in cases where the house is divided into different tenements structurally severed from each other, as for instance in the case of flats and sets of chambers.

Where a part of the ground floor and basement of a building was severed from the rest of the building by a party wall, and had its own separate entrance, there being no communication between it and the rest of the building, and the part so separated was used wholly for the purposes of a bank:—

Held, that such part of the premises constituted a separate house, and being used solely for business purposes was exempt from inhabited house duty.

Semble, per Hawkins, J., that, when a house is substantially within the words of the sub-section above referred to as being a house structurally divided into and let in different tenements, the mere fact, that the landlord occupied one of such tenements forming a small portion of the whole, would not disentitle him to the relief given by the sub-section.

CASE stated for the opinion of the Court, under 37 & 38 Vict.

c. 16, s. 9, by the Income Tax Commissioners for the city of London, as follows:—

The respondents appealed against an assessment to the inhabited house duties for the year ending the 5th of April, 1879, of 6000*l.* at 9*d.* in the pound, upon and being the full value of the whole of the premises, No. 123, Bishopsgate Street, in the city of London, and claimed exemption in respect of one portion of the said premises under the Act 57 Geo. 3, c. 25, and in respect of the other portions under the Act 41 Vict. c. 15, s. 13.

The premises constituting No. 123, Bishopsgate Street, consist of a basement, ground, and upper floors, with two separate main entrances from the street. The ground floor and basement of the building on the south side with one of the entrances, are in the occupation of the respondents, are used by them as a bank for the purpose of carrying on their business as bankers, and have no internal communication whatever with the rest of the building, being separated by a party wall from the basement to the first floor.

The ground floor of the building on the north side is at present unoccupied. The first and second floors, which run over the whole of the premises, are occupied by several traders, and used entirely for business purposes. The third floor is also let to and occupied by traders, with the exception of two rooms in the occupation of Mr. Dennistown, a clerk in the employ of the respondents, who resides therein at night. The fourth floor is in the occupation of the housekeeper, wife, and family. The whole of the upper floors as well as the ground floor of the building on the north side are approached by the other entrance.

The respondents contended, first, that the premises in their own occupation were so structurally severed from the rest of the building as to be a different tenement, and inasmuch as they were used for the purposes of trade only, no persons sleeping or dwelling therein at night time, were exempt under 57 Geo. 3, c. 25; secondly, as regards the rest of the building, that it came within 41 Vict. c. 15, s. 13, sub-s. 1, as a house divided into and let in different tenements, and that the assessment should be reduced to the value of such tenements as were otherwise occupied than for trade, business, profession, or calling by which the occupier seeks a livelihood or profit.

The surveyor contended that the whole was occupied as one building in one occupation and ownership, and that the occupation by the bank clerk of two rooms rent free must be regarded as the occupation of the bank itself, consequently the premises did not come within sub-s. 1 of 41 Vict. c. 15, s. 13, as being let in different tenements and occupied solely for the purposes of business; and that the whole of the premises were liable to inhabited house duty.

The Commissioners were of opinion that the premises as divided were so structurally severed as to form two distinct buildings; that the tenement or building in the occupation of the Royal Bank of Scotland was exempt from the inhabited house duty, and that the other building being let out in tenements came within 41 Vict. c. 15, s. 13, sub-s. 1, and they reduced the assessment to the sum of 150*l.*, being the annual value of the tenements occupied otherwise than for trade.

June 2. *Sir F. Herschell, S.G.* (*Dicey*, with him), for the appellant. It is contended for the Crown, that the whole of these premises constitute one house for the purpose of inhabited house duty under 48 Geo. 3, c. 55, sched. B. If that is so, inasmuch as the whole of the house is not shewn to be used for business purposes, there is no exemption under 57 Geo. 3, c. 25, s. 1, as extended by 32 & 33 Vict. c. 14, s. 11.

Secondly, assuming that the part used for banking purposes is to be considered as a separate house, and that the decision of the Commissioners as to that part of the premises is correct, it is contended that their decision as to the remainder of the premises is erroneous. They held that the case fell within 41 Vict. c. 15, s. 13, sub-s. 1. It is not shewn that that part of the premises is divided into separate tenements as required by the provisions of the sub-section. The object of these provisions of s. 13 was to obviate the hardships entailed by the decisions in the cases of *Attorney General* v. *Mutual Tontine Westminster Chambers Association* (1), and *Rusby* v. *Newson* (2), in the former of which cases it was held that where there were blocks of buildings divided into flats the whole of each block must be treated as an entire house,

(1) Law Rep. 10 Ex. 305; 1 Ex. D. 469.

(2) Law Rep. 10 Ex. 322.

and consequently must be assessed on the full value, though many of the flats were unlet and unoccupied, and in the latter, that when any part of a building was occupied for other than trade purposes, as by a housekeeper, or for professional purposes, no abatement could be made in respect of parts occupied for trade purposes only under 57 Geo. 3, c. 25, s. 1. In order to satisfy the words of the 1st sub-section there must be a structural division into separate tenements as in the case of flats or sets of chambers. It is not sufficient that there are separate occupations of different parts of a house not structurally severed: *Yorkshire Fire Insurance Co.* v. *Clayton.* (1) It was held by Lindley, J., in that case, that, where the landlords occupy part of a house otherwise than as caretakers, the house is not divided into and let in different tenements within the statute. If that be so, the fact that Mr. Dennistown, the respondents' clerk, occupied two rooms rent free in the building would exclude the application of the sub-section.

F. M. White, Q.C. (*Shiress Will,* with him), for the respondents. It is contended for the respondents that the part of the premises used for the purposes of the bank is clearly a separate house and must be treated as such for the purposes of the duty. There is an entire structural severance. Consequently as this part is solely used for business purposes it is exempt under 57 Geo. 3, c. 25, s. 1, or 41 Vict. c. 15, s. 13, sub-s. 2. With regard to the remainder of the premises it is contended that the case is within sub-s. 1 of 41 Vict. c. 15, s. 13. The words of the sub-section are not confined to cases where there are separate flats or sets of chambers. They apply to any case where the house is divided into separate occupations. The hardship which the sub-section is intended to meet is not in the nature of things confined to cases where there is a structural severance, and there is nothing in the reason of the thing to confine the remedy to such cases. It is submitted that the words and the justice of the case require that, when there is a letting to different occupiers of different and distinct parts of a house, the relief given by the sub-section should apply. It is not shewn that Mr. Dennistown occupies on behalf of the respondents.

Sir F. Herschell, S.G., in reply.

Cur. adv. vult.

---

(1) 6 Q. B. D. 557.

June 3. HUDDLESTON, B. In this case the Commissioners of Inland Revenue have decided that the part of the premises in which the business of the bank was carried on was not assessable, and they have also held that other portions of the premises were exempt under 41 Vict. c. 15. The first question, therefore, is whether the premises on the basement and ground floor, which are entered by one of the entrances from the street, and separated, as described in the case, from the rest of the premises, and which are used by the respondents for the purposes of their business as bankers, constitute a house within 48 Geo. 3, c. 55, and being a house used solely for the purposes of business are exempt under 57 Geo. 3, c. 25. It was argued for the Crown that they were merely a portion of an inhabited house. It is very difficult to give an accurate definition of a "house." One knows practically what it is, and I should be inclined to think as good as any the definition given of it in the books on criminal law, where the question of burglary is discussed, as "a permanent building in which the tenant, or the owner and his family, dwells or lies." It must not be a mere tent or booth, as in a market, it must be a permanent building, and it is said in the authorities on the subject that a room or lodging in a private house may be the mansion for the time being of the lodger, if the owner doth not himself dwell in the house, or if he and his lodger enter by different outer doors; but if the owner himself lies in the house, and has but one outer door at which he and his lodger enters, such lodger seems only to be an inmate, and all the premises to be but one mansion or dwelling-house of the owner. The building now in question is a building structurally separated from all the rest of the house, in which persons may live if they choose, with an outer door of its own, and it seems to be to all intents and purposes, both according to legal and to popular parlance, a house, and inasmuch as it is a house within 48 Geo. 3, c. 55, and it is occupied merely for the purposes of trade or business within 57 Geo. 3, c. 25, we think it is exempt from inhabited house duty. The second question is as to the other part of the premises. It seems to me that, having regard to such definition of a house as I have been able to give, the other part of the premises constitutes a house, and as it is not occupied exclusively for the purposes of trade or business it is not exempt within the meaning of the statute I have just referred to. But it is argued that it is exempt within the provisions of the 13th section of 41 Vict. c. 15. The onus of proving the exemption must lie upon the respondents, and to make them exempt they must shew that the house being one property was divided into and let in different tenements within 41 Vict. c. 15, s. 13, sub-s. 1. I am disposed to agree with the view taken by my Brothers Grove and Lindley, JJ., in the case of *Yorkshire Fire Office* v. *Clayton* (1), that in order to come within the sub-section the house must be divided into separate and distinct tenements and let in such tenements, and that, if the owner occupy any portion of the premises, the house would not come within the sub-section as not being so let. But it is not necessary that I should decide that point, because it seems to me to be clear on another ground that these premises are not within the sub-section. I apprehend that the sub-section contemplates the case of a house not only let in different tenements but divided into tenements structurally distinct from one another, as, for instance, was the case in *Attorney General* v. *Mutual Tontine Westminster Chambers Association, Limited* (2), where there was an outer door, but each floor or tenement was structurally divided from the others. A familiar instance is where a house is divided into and let in flats. There is in such cases a common staircase, but each flat is structurally divided so as to form a tenement by itself. I think the legislature, in passing the sub-section, contemplated cases such as that, and I agree with the suggestion of the Solicitor-General that the object of the provisions of the section was to obviate the difficulties created in consequence of the respective decisions in *Rusby* v. *Newson* (3) and *Attorney General* v. *Mutual Tontine Westminster Chambers Association.* (2) From the description of this part of the premises given in the case, it does not appear that the upper floors are structurally divided into different tenements though the different rooms, or portions of the premises, may be occupied by different persons. It seems to me, therefore, that these premises do not come within the sub-section that has been relied on, inasmuch as they are not divided into and let in

(1) 6 Q. B. D. 557.

(2) Law Rep. 10 Ex. 305; 1 Ex. D. 469.

(3) Law Rep. 10 Ex. 322.

different tenements. Under these circumstances the decision of the Commissioners must stand with reference to the first-mentioned portion of the premises, and be set aside with reference to the remaining portion of the premises.

HAWKINS, J. I am clearly of opinion that the Commissioners rightly relieved the respondents from the assessment so far as it related to the portion of the building occupied and used by them as a bank. That portion of the building was as distinct and as much separated from the rest of the building as it was possible to be, and to my mind it very clearly falls within the exemption given by 57 Geo. 3, c. 25, s. 1, as being a house occupied wholly for the purposes of trade, and it seems to fall also, if it were necessary to have recourse to 41 Vict. c. 15, within the 2nd subsection of section 13 of that Act. I shall not attempt to give any definition of a "house." It seems impossible to give any very exact definition. But certainly I conceive it to be impossible to say that that is not a house which is, like this structure, entirely and absolutely isolated from every other part of the building, so that no access can be had from it to the rest of the building, or from the rest of the building to it, and which has a separate outer door from the street. Suppose such a structure had stood alone and by itself, suppose there had been a single room with a basement below, made with substantial walls round it, and with a door opening on to the street, and suppose a man chose to go and live in it and to carry on his business there, could it be said that that was not a house, there being no communication with any other building, and it being an entirely distinct and separate property? Then how can it make any difference, and how can it be less a house because the owner has thought fit to allow an adjoining house to be built and to be continued partly over it? It seems to me impossible to say, if it would be a house standing by itself, that it is rendered less a house because somebody has built rooms over it, whether it be the same owner or somebody else by his permission. For these reasons I think this portion of the premises was clearly exempt.

With regard to the rest of the building I do not agree with the conclusions arrived at by the Commissioners. It is not necessary to discuss at length all the authorities which are cited in the cases of *Attorney General* v. *Mutual Tontine Westminster Chambers Association* (1), and *Rusby* v. *Newson* (2), by the former of which it was decided that, although the building was structurally divided into several distinct and separate tenements, it must be assessed in its entirety as one building, and at its entire value, even though some of the distinct tenements were unoccupied and unproductive, and by the latter of which it was decided that if any, even the smallest portion of an entire building, were used for other than trade purposes, the whole building was liable to the full assessment. It was to enable the owners of houses to obtain relief against these very obvious hardships that 41 Vict. c. 15, s. 13, was passed. Sub-s. 1 of s. 13 applies "when any house being one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied." The 2nd sub-section is not applicable to the part of the premises with which I am dealing. That sub-section appears to apply to a case in which a house or tenement is occupied as a single tenement by a single occupier solely for the purpose of his trade or business, and to have been intended to give relief to the occupier of such building so occupied, notwithstanding the fact that he might have a servant, or housekeeper, or other person dwelling there for protection thereof, and of course under this provision if a man were to occupy the house himself, or any part thereof, for the purposes of a residence, it could not be said to be occupied solely for the purposes of his trade or business, and so would not come within the exemption. We have therefore to consider the meaning of the 1st sub-section, and under what circumstances it was thereby intended that relief should be given, and against what hardships. Now the two cases that have been cited to us, and which I have mentioned, involved obvious hardships to the owners of property, and it was to such cases I think that the provisions of the section were intended to apply. It will be seen that while the 2nd sub-section applies to a house which in its integrity is used for the purposes of trade, the 1st sub-section applies to a house which is

(1) Law Rep. 10 Ex. 305; 1 Ex. D. 469.

(2) Law Rep. 10 Ex. 322.

divided into separate tenements to be occupied by different persons, and possibly some of them for the purposes of professions, some for the purposes of trade, and some for residential purposes. But, in order that the exemption may arise, the house must be both divided into and let in different tenements. What, then, is the meaning of the word "divided" in the sub-section? It was contended for the respondents that the exemption applied when there was the mere letting of separate portions of the house, even though there was no structural division. I do not so construe the words. The words are not only "let in different tenements," but "divided into and let in different tenements," and having regard to the previous Acts and the context I think the sub-section contemplates a structural division. It is no doubt difficult to lay down a general rule as to what constitutes a structural division. I do not apprehend that any particular mode of division is essential provided that there is an actual division into separate tenements. It does not matter whether the division is by a brick wall or by lath and plaster, or by match-boarding; but there must be such a division that any one going over the premises would say, "This is one tenement; that is another." An imaginary line of division will not suffice. There must be a sort of division analogous to what we find in sets of chambers, and a great many of those mercantile buildings which have been erected to so great an extent lately in the city of London. There must be the letting of a separate tenement other than a mere apartment, as appears, I think, from the Income Tax Act, 16 & 17 Vict. c. 34, s. 36, which says that any house or building let in different apartments or tenements, and occupied by two or more persons severally, shall nevertheless be charged to the duty under this Act as one entire house or tenement, so that the distinction between a separate tenement and a mere apartment or apartments is recognised by these Acts. The conclusion, therefore, at which I have arrived, having regard to the previous legislation, is that a structural division was intended; that there must be such a division of the house into distinct tenements that each particular tenement may constitute a smaller house within a house. I cannot find upon consideration of the description given of this part of the premises that there was any such division in this case. It is for the person claiming exemption to bring himself within the sub-section, and it seems to me that the respondents fail to do so. For these reasons I think that their claim of exemption in respect of this portion of the premises must be disallowed.

There is one part of the case that was argued before us, upon which it is not necessary to give an absolute decision, but upon which I desire to say a word. It was contended that Mr. Dennistown, being a clerk in the service of the bank, who are really the owners of the whole house, and occupying two rooms, must be taken to be occupying these two rooms in the character of a servant on behalf of the respondents. If he had resided in the separate portion of the house in which the banking business was carried on, and had resided there not as a mere caretaker, but as a clerk who was allowed to occupy rent free as part of his salary, or the remuneration for his services, there would have been an end of the question, as it could no longer be considered a house used solely for the purposes of trade. But the bank have nothing to do it would appear with the part of the premises with which I am now dealing. They do not themselves occupy any part of it. There is the coincidence that one of their clerks occupies two rooms, but how he comes to do so we are not informed, and I cannot come to the conclusion on the materials before us that he is occupying a part of the premises on behalf of the respondents, so as to make the house occupied partly by the landlord, and partly by the occupiers of the other tenements. But let us assume for a moment that it was so occupied, that the house had been divided into a number of separate tenements, and that those separate tenements had been occupied, one of them by Mr. Dennistown, as representing the landlords, and the others by different occupiers; I am very far from saying that I agree in the notion that the house would merely because of that occupation by Mr. Dennistown be rendered incapable of being exempt under this 13th section. I make this observation because I cannot myself, at present, without much further consideration, give my assent to the suggestion which is made by my Brother Lindley, in his judgment in the case of *Yorkshire Insurance Company* v.

1881

CHAPMAN v. ROYAL BANK OF SCOTLAND.

Hawkins, J.

Clayton. (1) "I do not think," he says, "that the clause applies to a case where a landlord occupies any part of the house, not as a caretaker, which might bring the case within the second sub-section, but for the purposes of residence or business." Speaking for myself, I confess I cannot agree with that suggestion. It strikes me that the words of the 1st sub-section are rather against that view. If the landlord is occupying for other purposes than business a part of the house, the whole of the rest of which he occupies for the purposes of business, it is clear he would not be exempt under the 2nd sub-section, but the suggestion is that, under the 1st sub-section, if the house is divided into different tenements within the meaning of the sub-section, and the landlord reserves to himself one single tenement in the house, it cannot be said to be let in different tenements within the meaning of the sub-section. I confess I think myself that that is rather against the intention of the legislature. I think the intention, though perhaps not expressed in the aptest terms, is that the relief shall be given when a house being one entire property is subdivided into distinct tenements for the purpose of letting, and substantially the whole house is let or intended to be let. It would not do for the landlord to occupy substantially the whole of the house, and sublet one small portion. Suppose, however, a landlord built a house divided into a hundred different tenements, ninty-nine of which could profitably be made use of for business and trade, or professional purposes, but one single tenement at the top of the house proved inapplicable for such purposes, and the landlord occupied it himself, because no one else could, I cannot come to the conclusion that the intention of the legislature was in such a case to deprive him of the benefit that he otherwise would have by reason of the subdivision of the house into different tenements, and I cannot think that the landlord who occupied one single tenement in such a case for purposes other than those of trade, could be deprived of the benefit of the exemption. It is contended that even if he occupied it for the purposes of trade, it would prevent him from claiming exemption. It does not seem to me that such is the meaning of the legislature. It is not necessary to decide this point, and I only mention it because a difference of opinion exists on the matter, and I do not wish it to be thought that my opinion, whatever it may be worth, is in favour of the view, that in such a case the landlord would be disentitled to claim the exemption given by the sub-section.

---

(1) 6 Q. B. D. 560.

The ground upon which I decide this case is, that as regards the first portion of the house, it is a house occupied solely for the purposes of business, and therefore exempt under both the statutes to which I have referred, and as regards the other portion of the house, there must be judgment for the Crown, because there is nothing to shew that the house has been divided into, and let in separate tenements, in the way mentioned in the sub-section. Therefore, our judgment will be with regard to the one portion of the premises for the respondents, and with regard to the other, for the Crown.

Judgment accordingly.

Solicitor for Appellant: *Solicitor to Inland Revenue.*
Solicitor for Respondents: *William Gordon.*

E. L.

[CROWN CASE RESERVED.]

May 21.

REG. *v.* FENNELL.

Evidence—Confession—Admissibility of.

On a trial for larceny, evidence was received of a confession made by the prisoner to the prosecutor in the presence of a police inspector, immediately after the prosecutor had said to the prisoner, "The inspector tells me you are making house-breaking implements; if that is so, you had better tell the truth, it may be better for you":—

Held, by the Court (Lord Coleridge, C.J., Grove, Hawkins, Lopes, and Stephen, JJ.), that the confession was not admissible in evidence.

THE following case was stated by the deputy chairman of the Surrey sessions:—

William Fennell and Arthur Male were tried before me on April 11th, 1881, on an indictment which charged them with larceny as servants. I withdrew the case of Male from the jury for want of sufficient evidence.

Fennel was convicted mainly upon admissions made by him in the presence of the prosecutor and Inspector Chamberlain, before he was charged.

The question upon which the Court are asked to give their opinion is:—Whether the admissions made by the prisoner Fennell were properly received in evidence as against him.

The following are the circumstances under which the admissions were made:—Previously to being charged, Fennell was taken into a room with the prosecutor and Inspector Chamberlain. The prosecutor then said to Fennell, "he (meaning Chamberlain) tells me you are making house-breaking implements; if that is so, you had better tell the truth, it may be better for you."

The point was then raised by Fennell's counsel as to whether these admissions of Fennell could, after what the prosecutor had said to him, be received in evidence.

I decided that they might be received, on the ground that the words addressed to Fennell by the prosecutor did not "import a threat of evil or a promise of good," and so render his statement inadmissible.

If the Court should be of opinion that the admissions of Fennell were receivable, the conviction is to be affirmed; if, on the other hand, the Court should be of opinion that they ought not to have been received, the conviction is to be quashed.

Mews, for the prisoner. The question of the admissibility of confessions of prisoners is dealt with in Hawkins' Pleas of the Crown, bk. ii. ch. 46, sect. 36, and it is there said: "As the human mind under the pressure of calamity is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence." This is still law in criminal cases. In Taylor on Evidence, 7th ed. p. 730 et seq., the authorities are collected and discussed. The question of what inducement or threat will exclude a confession is dealt with at considerable length in *Reg.* v. *Baldry* (1), a case which overrules some previous decisions which were in favour of prisoners. It is there said that a simple caution to the accused to tell the truth will not prevent the subsequent statement from being admissible in evidence against the accused; but that where the admonition is coupled with any expression importing that it would be better for him to tell the truth, the subsequent statement is inadmissible. The difference there suggested is, that in the one case the accused is left to his own judgment and choice as to whether he will say anything or not, and that in the other he is induced to speak by the notion held out to him that he had better say something. In *Reg.* v. *Gillis* (2), an Irish case, Fitzgerald, B., says, that there are three conditions necessary to render a confession inadmissible. First, the existence of a charge made against, or a suspicion attached to, a prisoner. Secondly, the presence of a person in authority. Thirdly, some reason to infer that the admission is made under the influence of hope or fear, sanctioned in some way by such person in authority. The third condition is the only one as to which any contention arises here. There was an inducement held out, but the question is, whether it was of such a nature as to exclude the confession made. That it was appears to be decided by previous cases. In *Reg.* v. *Garner* (3) a confession by a girl aged thirteen, suspected of administering poison to her mistress, made, after being told by a medical man, in the presence of her master and mistress, that it would be better for her to speak the truth, was held inadmissible. Maule, J., there says, those words have been held over and over again to convey such an inducement as would prevent the confession from being voluntary. In *Reg.* v. *Jarvis* (4), Kelly, C.B., says that it has to be considered whether the words used import a threat of evil or a promise of good, and that the words "you had better," seem to have acquired a sort of technical meaning, that they hold out an inducement or threat within the rule that excludes confessions. In *Reg.* v. *Bate* (1) a policeman said to the accused, "It might be better for you to tell the truth, and not a lie," and a confession made upon this was held inadmissible. *Reg.* v. *Doherty* (2) is to the same effect. The case of *Reg.* v. *Reeve* (3) may be distinguished. In that case a mother said to her children, who were in custody on a criminal charge, "you had better, as good boys, tell the truth," whereupon they confessed their guilt, and the confession was held admissible. The words "as good boys" do not point to any temporal advantage, but are like the words used in *Reg.* v. *Sleeman* (4), a moral exhortation merely. The mother, too, may be said not to have been in that case "a person in authority."

---

(1) 2 Den. C. C. 430; 21 L. J. (M.C.) 130.

(2) 11 Cox, C. C. 69, 73.

(3) 1 Den. C. C. 329; 2 C. & K. 920; 18 L. J. (M.C.) 1.

(4) Law Rep. 1 C. C. R. 96; 37 L. J. (M.C.) 1.

[He also referred to *Reg.* v. *Luckhurst.* (5)]

Prankerd, for the prosecution. The inducement could not here have really operated to produce a false confession. It is said by Erle, J., in *Reg.* v. *Garner* (6), that it is for the judge in every case to decide whether the words were used in such a manner, and under such circumstances, as to induce the prisoner to make a confession of guilt whether such confession were true or no. In Burn's Justice of the Peace, 30th ed. vol. i. p. 973, the general result of the decided cases is said to be that the only questions in these cases are—Was any promise of favour, or any menace, or undue terror made use of, to induce the prisoner to confess? and if so, was the prisoner induced thereby to make the confession, or was such promise or menace operating on his mind when he made it? If the judge be of opinion, it is there said, in the affirmative upon both these questions, he will reject the evidence. If, on the contrary, it appear to him from circumstances, that although such promises or menaces were holden out, they did not operate upon the mind of the prisoner, but that his confession was voluntary notwithstanding, the judge will admit the evidence.

[LORD COLERIDGE, C.J. The rule laid down in Russell on

---

(1) 11 Cox, C. C. 686.

(2) 13 Cox, C. C. 23.

(3) Law Rep. 1 C. C. R. 362; 41 L. J. (M.C.) 92.

(4) 6 Cox, C. C. 245; 23 L. J. (M.C.) 19.

(5) 6 Cox, C. C. 243; 23 L. J. (M.C.) 18.

(6) 1 Den. C. C. 329; 2 C. & K. 920; 18 L. J. (M.C.) 1.

1881

REG. v. FENNELL.

Crimes, 5th ed. vol. iii. pp. 441, 442, is, that a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. It is well known that the chapter of Russell on Crimes containing that passage was written by Sir E. V. Williams, a great authority upon these matters.]

It is found in effect by the presiding judge in the present case that the words did not operate as a threat of evil or promise of good upon the accused.

[He further referred to Starkie on Evidence, 3rd ed. vol. ii. p. 36.]

LORD COLERIDGE, C.J. We are all of opinion that this conviction cannot stand. Upon well decided cases we are of opinion that this statement is inadmissible.

Conviction quashed.

Solicitor for prosecution: *The Clerk of the Peace for the County of Surrey.*

Solicitor for prisoner: *W. H. Fullagar.*

C. D.

CLARKE *v.* BRADLAUGH.

June 21.

Time from which Writ takes effect—Day, Fractions of—Writ of Summons issued on same Day as Cause of Action accrued—Fiction of Law.

21 ChD 765

It appeared from the statement of claim that the writ of summons in the action issued on the 2nd of July, and that on the same day, but before the issuing of the writ, the cause of action arose. The statement of claim was demurred to on the ground that the issuing of the writ of summons being a judicial act must be considered as having taken place at the earliest moment of the day, and therefore before the cause of action accrued:—

Held, that the Court could for this purpose take cognizance of the fact that the writ did not issue till later in the day than the cause of action accrued, and that the statement of claim was therefore good.

affirmed on appeal 8 QBD 63. CA

DEMURRER to a statement of claim claiming penalties against the defendant for having sat and voted in the House of Commons without having taken the qualifying oath.

1881

CLARKE
v.
BRADLAUGH.

It appeared from the statement of claim that the writ of summons in the action was issued on the 2nd of July, 1880, and that upon the same day, but before the issuing of the writ, the cause of action arose.

The defendant in person, in support of the demurrer, contended that the issuing of the writ was a judicial act, that a judicial act must be considered as done at the earliest moment of the day, and the Court could not take cognizance of fractions of a day with reference thereto, and that consequently the writ must be considered as having issued before the cause of action accrued; and that the statement of claim was therefore bad.

[He cited *Reg.* v. *Edwards* (1); *Swain* v. *Morland* (2); *Wright* v. *Mills* (3); *Chick* v. *Smith* (4); *Combe* v. *Pitt* (5); *Campbell* v. *Strangeways* (6); *Tomlinson* v. *Bullock* (7); *Castrique* v. *Bernabo* (8); *Lord Portchester* v. *Petrie* (9); *Boyd* v. *Durand* (10); *Shelley's Case* (11); *Alston* v. *Underhill.* (12)]

Sir Hardinge Giffard, Q.C. (*Kydd*, with him), for the plaintiff, contended that the issuing of a writ of summons in an action was substantially the act of the party, and not a judicial act within the meaning of the doctrine above referred to, and that the Court could take cognizance of the fact that the cause of action occurred earlier in the day than the issue of the writ.

The defendant, in reply.

DENMAN, J. I am of opinion that this demurrer must be overruled. The demurrer appears to be put upon the ground that, admitting that it is in fact true, as alleged in the statement of claim, that the sitting and voting complained of took place earlier in the day than the issue of the writ, nevertheless we are bound to hold that in contemplation of law the writ issued before the penalty was incurred, and that therefore the action is not maintainable.

(1) 9 Ex. 32, 628.
(2) 1 B. & B. 370.
(3) 4 H. & N. 491. 5 Jur NS 771
(4) 8 Dowl. 337.
(5) 3 Burr. 1434.
(6) 3 C. P. D. 105.
(7) 4 Q. B. D. 230.
(8) 6 Q. B. 498.
(9) 3 Douglas Rep. by Roscoe, 261; 2 Wm. Saund. 148 b, n.; cited Tidd's Practice, 9th ed. 935, n.
(10) 2 Taunt. 161.
(11) 1 Rep. 93 b.
(12) 1 C. & M. 492.

In support of this contention reliance was placed upon a doctrine of law derived from the decisions and dicta that have been cited by the defendant; and no doubt in several of the cases cited very strong consequences, consequences which one would hardly have expected to follow from any legal doctrine, have been held to follow from the legal doctrine applied in those cases, which roughly stated is, that judicial acts are referred back to the first moment of the day on which they are done. *Wright* v. *Mills* (1) was a very strong case, in which it was held that where judgment was signed and execution issued in the name of a person who had died on the same day previously to the signing of judgment, the proceeding must be considered as having been taken before his death. *Reg.* v. *Edwards* (2) was also a very strong case. But I am of opinion that the doctrine in question is not applicable to such a case as this. It is a fiction of law, and the doctrine underlying all the doctrines with regard to fictions of law would be violated if we sustained the defendant's contention. A fiction of law exists for the purpose of doing justice in the particular case. If this doctrine were applied, as contended for, to a writ of summons, it could never tend to justice, but always must tend to injustice. It would be arbitrarily saying that wherever a wrong was committed the party committing it should have a certain latitude of time in which he might withdraw himself from the jurisdiction of the Court. Suppose, for instance, a man committed an assault at 10 A.M., according to the defendant's contention he must have till the next day before he could be sued. I cannot see how such a practice could in any way be in furtherance of justice; and it seems to me it might be very much the contrary. Unless there is some very cogent authority to compel us to apply this doctrine for the first time to a case like this, I do not think we ought to do so. I prefer to put my decision thus shortly, rather than to attempt minutely to lay down the exact line at which the doctrine that has been relied upon begins and ceases to apply. It may be suggested that the doctrine, though it may appear in some cases to be otherwise applied, is really, when it comes to be carefully looked at, that where there are conflicting claims between subject and subject the Court can look to the

(1) 4 H. & N. 491. 5 Jur NS 771

(2) 9 Ex. 32, 628.

fractions of a day, and that this is a case of such claims; but I do not think it necessary in the present case to lay down the exact limits of the doctrine, and to what cases it is and to what it is not applicable. I think it cannot be applied to this case, on the ground that to apply it would be to defeat that very proceeding upon the authority and respect due to which the doctrine is based; it would be giving priority to the writ in order to defeat the object of its being issued. It seems to me impossible that it can apply to a writ of summons for this purpose, and no authority has been cited to shew that it does.

WATKIN WILLIAMS, J. I am of the same opinion. We must take it to be admitted by the demurrer that a good cause of action did in fact accrue before the writ issued, but it is contended that the express averment to that effect is to be nullified and contradicted by the legal fiction that the writ must be taken to have issued at the first moment after midnight of the 1st of July. This does not seem to me in accordance with any of the authorities. Here we have admitted on the record a positive averment that the cause of action preceded the writ, and we are asked to rely, in the face of the express averment, on a supposed inference derived from a fiction of law that the writ preceded the cause of action. I do not think there is any authority which compels us so to violate the rules of common sense. I think, therefore, the demurrer must be overruled, and there must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitor for plaintiff: *W. G. Stuart.*
Solicitors for defendant: *Lewis & Lewis.*

E. L.

Ex parte EDWARDS.

1881
June 22.

Solicitor and Client—Refusal by Town Agent of Solicitor to pay to lay Client Amount of Debt received in an Action—Summary jurisdiction of the Court over its own officer.

The town agent of the solicitor of the plaintiff in an action, in which judgment had been recovered for a debt of 33*l.* 5*s.* and costs, refused to pay over to the plaintiff the amount of the debt which had been received by him from the sheriff under a writ of fi. fa., on the ground that he was entitled to retain such amount for a debt due to him from the country solicitor of equal amount. The country solicitor had no lien on such amount against his client, the plaintiff:—

Held, that the Court, in the exercise of its summary jurisdiction over its own officers, would order the town agent to pay over the amount of the debt to the plaintiff.

Affirmed by Ct of Appl 8 QBD. 262. CA

This was an application to the Court to order, in the exercise of its summary jurisdiction, that a solicitor should pay over a sum of money received by him, to the applicant.

The facts are fully stated in the judgment.

Feb. 22. *Dodd*, for the applicant, moved for a rule accordingly. The report of the master is really conclusive of the matter. It is clear that the London agent is not entitled to retain the amount of the debt recovered as against the client of the country solicitor. The Court will interfere summarily and order the solicitor to pay over money which he has received as an officer of the court to the client. The fact that there is no privity and that an action would not lie is immaterial. The jurisdiction of the Court over its own officers is not fettered by technical rules. [He cited in addition to the cases referred to in the judgment: *Lawrence* v. *Fletcher* (1); *Cobb* v. *Becke.* (2)]

Orr, shewed cause. This case is governed by *Robbins* v. *Fennell.* (3) There is nothing fraudulent here in the conduct of the solicitor. He received the money properly in the ordinary course of business, and is claiming what he conceives to be his right in retaining it. The case is therefore distinguishable from *Robbins* v. *Heath.* (4) It is contended that in that case the decision proceeded on the footing that the money was improperly received. There is no privity between the lay client and the

(1) 12 Ch. D. 858.
(2) 6 Q. B. 930.
(3) 11 Q. B. 248.
(4) 11 Q. B. 257.

town agent. He did not receive the money for her or as her agent. The Court will not, when there has been no impropriety or misconduct on the part of the solicitor, determine a disputed question of right such as this on an application to its summary jurisdiction. The country solicitor may have a lien on the amount recovered by the judgment against the client, and the London agent will be entitled to the benefit of that lien if the country solicitor be indebted to him. Is the London agent bound to know the state of accounts between the country solicitor and his client? He probably would have no means of knowing it.

Dodd, in reply.

Cur. adv. vult.

June 22. The judgment of the Court (Field and Manisty, JJ.), was delivered by

Manisty, J. This was originally an application on the part of Miss Edwards for a rule calling upon Mr. Johnson, a solicitor of this Court, to shew cause why he should not answer the matters of certain affidavits which alleged that he improperly withheld from her a sum of 33*l*. 5*s*., which had been recovered in an action brought by her against a Mr. Whitwell, and why he should not pay the costs of the application. The matter was referred to Master Butler, to report thereon to this Court. On the 3rd of November, 1880, the Master reported as follows: "On the 3rd of November, 1879, the said Mr. G. Johnson was instructed by Mr. W. R. Raynes, a solicitor, to commence an action as his London agent, at the suit of a Miss Edwards, against a Mr. Thomas Whitwell. In this action judgment was recovered for the plaintiff under Order XIV., rule 1, of the Rules of the Supreme Court, 1875. Mr. Raynes instructed Mr. Johnson to issue execution for the amount of the debt, 33*l*. 5*s*. and costs, 9*l*. 16*s*. 6*d*., and a writ of fi. fa. was accordingly issued directed to the sheriff of Essex. On or about the 13th day of March, 1880, Mr. Johnson received from the sheriff of Essex the sum of 43*l*. 1*s*. 6*d*., being the amount of debt and costs levied under the said writ of fi. fa. Mr. Johnson had no authority or instructions from either Miss Edwards or Mr. Raynes to receive this money, but he received it as Mr. Raynes' London agent. At the time of receiving this money, Mr. Raynes was indebted to Mr. Johnson for costs incurred as his London agent (including the sum of 8*l.* 10*s.* 9*d.*, the amount of Mr. Johnson's agency charges in the action of *Edwards* v. *Whitwell*), in a sum equal to or exceeding the amount 43*l.* 1*s.* 6*d.* so received, and Mr. Johnson claims to retain this amount in part payment of his said costs against Mr. Raynes."

On the 17th of November, 1880, on reading the report of the 3rd and hearing counsel for Miss Edwards and Mr. Johnson, the Court ordered the matter to be referred back to the Master to further report as to the general practice between solicitors and their London agents, and also as to the forms of the writ of summons and fieri facias mentioned in the report of the 3rd of November, and as to the practice of the two parties—Mr. Raynes and Mr. Johnson—as to accounts.

On the 9th of December, 1880, the master made his further report to the following effect: "I find the general practice between country solicitors and their town agents to be that when the writ of execution is issued by the town agent, the town agent receives the proceeds of such execution on behalf of the country solicitor; that the town agent is not entitled to retain any debt or any part of a debt so recovered; that he has a lien upon, and is entitled to retain the costs so recovered for any costs that may be owing to him by the country solicitor on his general agency account; that the London agent is entitled to the same lien as, and no greater lien than, the country solicitor, and therefore, if the country solicitor could not retain the debt recovered as aforesaid against his client, so neither can the London agent retain it. The original writ in the action of *Edwards* v. *Whitwell* is hereto annexed. It is endorsed, so far as is here material, as follows: 'This writ was issued by George Johnson of No. 126, Fenchurch Street, in the city of London, agent for William Race Raynes, of, &c., solicitor for the said plaintiff, &c.' A copy of the writ of fieri facias issued in this action is also annexed hereto. It is endorsed, so far as is here material, as follows: 'This writ was issued by George Johnson, of No. 126, Fenchurch Street, in the city of London, agent for William Race Raynes, of, &c., solicitor for the plaintiff, &c.' I further find that there was not any practice as to accounts between Mr. Johnson and Mr. Raynes, as this was the first time Mr. Johnson ever received any money for or on behalf of Mr. Raynes."

Upon reading the master's reports, Mr. Dodd moved, on the part of Miss Edwards, for an order directing Mr. Johnson to pay over to her the 33*l.* 5*s.*, with costs. Mr. Orr shewed cause. On the part of Miss Edwards it was contended that the money was improperly retained by Mr. Johnson, and that the Court had summary jurisdiction over him in the matter. On the part of Mr. Johnson, it was contended that there was no privity of contract between Miss Edwards and himself, and no duty on his part to pay over the debt to her, consequently that the Court had no jurisdiction in the matter. In support of the applicant's contention the following authorities were cited: *Ex parte Bayley, In re Harper* (1); *Hanley* v. *Cassan* (2); *Robbins* v. *Heath.* (3) In support of the opposite contention, the case of *Robbins* v. *Fennell* (4) was strongly relied upon. We have considered the authorities, and have come to the conclusion that the Court has jurisdiction in the matter, and ought to interfere summarily to compel Mr. Johnson, as an officer of the court, to pay over the money to Miss Edwards. We adopt the language of Lord Tenterden in the case of *Ex parte Bayley* (1), viz., "that the Court exercises a jurisdiction over solicitors, and that it ought to be exercised according to law and conscience, and not by any technical rules." A country solicitor, as a general rule, employs an agent in London to conduct the proceedings in actions in which he is retained, and the London agent knows perfectly well that debts recovered in such actions belong to the country solicitor's clients, subject, of course, to any claim which the country solicitor may have, by way of lien or otherwise.

Having regard to the well-known usage and practice as found by the master, and to the fact that Mr. Raynes, the country solicitor, not only has no claim upon the money in question, but is desirous that it should be paid over to Miss Edwards, we are of opinion that it is a breach of duty on the part of Mr. Johnson not to pay it, and that this Court has summary jurisdiction over him as an officer of the court, and ought to compel him to pay it.

(1) 9 B. & C. 691.

(2) 11 Jur. 1088; 10 L. T. 189.

(3) 11 Q. B. 257.

(4) 11 Q. B. 248.

The most disastrous consequences might result to suitors if the London agents of their solicitors might stop all moneys which come to their hands, and appropriate them to the payment of debts due to themselves from the country solicitor, without being liable either to an action or to the summary jurisdiction of the Court. Take the case of a country solicitor being discovered to be in a state of hopeless insolvency, and a debt of large amount due to a client having been received by his London agent. Can it be doubted but that an injunction would be granted, at the instance of the client, to restrain the London agent from paying over the money to the country solicitor, and commanding him either to pay it into court or to pay it over to the client? We think such an injunction would be granted as a matter of course, and if so, we do not see why an order should not be made directing the London agent to pay over the money to the client in a case like the present. Of course, if the country solicitor has any claim upon the debt, by way of lien or otherwise, it would be protected, but, in the absence of any such claim, it seems to us that it would be contrary to equity and conscience to permit the London agent to pay himself out of the client's money any amount of debt which may be due to him from the country solicitor.

The case of *Robbins* v. *Fennell* (1), which was strongly relied upon by the counsel for Mr. Johnson, was an action at law, and the Court evidently found itself hampered by the technical rule of law as to privity of contract. In the case of *Robbins* v. *Heath* (2), which occurred in the following year, the application was to the summary jurisdiction of the Court, and the Court exercised it on the ground that the retention of the money by the London agents, for the purpose of paying a debt due to themselves from the country attorney, was an improper application of it. We think the same ground exists in the present case, and that a rule absolute should issue ordering Mr. Johnson to pay the 33*l*. 5*s*. to Miss Edwards, together with the costs of this application.

Rule absolute.

Solicitor for applicant: *John W. Sykes.*

Solicitor for town agent: *Johnson.*

(1) 11 Q. B. 248. (2) 11 Q. B. 257.

E. L.

1881
June 22.

HUGHES, APPELLANT; SUTHERLAND, RESPONDENT.

Shipping—Engaging or supplying Seamen or Apprentices—Owner—Merchant Shipping Act, 1854 (17 *&* 18 *Vict. c.* 104), *s.* 147, *sub-s.* 1.

By s. 147, sub-s. 1, of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), if any person not licensed by the Board of Trade other than "the owner or master or mate of a ship, or some person who is bonâ fide the servant and in the constant employ of the owner, or a shipping master duly appointed as aforesaid, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom," he incurs a penalty.

The respondent having bonâ fide contracted to purchase one sixty-fourth share in a British ship from P., who, though not registered as the owner, had the full possession and control of the ship under a contract to purchase the sixty-four shares, supplied an apprentice to P. who engaged the apprentice for the ship:—

Held, that the respondent was an "owner" within the meaning of the exemption, since though not a registered owner he had a contract enforceable in Equity for the purchase of a share in the ship.

CASE stated under 20 & 21 Vict. c. 43, by a justice of the peace for the City of London, upon an information preferred by the appellant against the respondent under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 147, sub-s. 1, for supplying an apprentice to be entered on board the *Aphrodita*, a registered British ship then in the United Kingdom. The following are the material facts proved at the hearing:—

On the 8th of December, 1880, Price made a contract with Oswald, Mordaunt, & Co., the then actual owners (though not then or at any time registered) for the purchase of the ship, and paid a deposit. On the 1st of January, 1881, the respondent agreed with Price to purchase from him one sixty-fourth share for 150*l.*, paid 5*l.* as a deposit, and took a receipt on account of one sixty-fourth share. In that month Price obtained the full possession and control of the ship, and afterwards engaged the master and crew. On the 29th of January, sixteen of the sixty-four shares were transferred by bill of sale to Price by Grimond, the registered owner of the sixteen shares, and on the 28th of February the remaining forty-eight shares were transferred by bill of sale to Price by Messrs. Macintyre the registered owners of the forty-eight shares. On the 3rd of March, Price, by bill of sale, transferred one sixty-fourth share to the respondent, who afterwards paid the remainder of the 150*l.* On the 4th of March, Price registered himself as the owner of sixty-four shares, and on the 7th of March he registered himself as managing owner, describing himself as registered sole owner.

On the 3rd of February, the respondent advertised for apprentices, and on the 12th, not being licensed by the Board of Trade, he supplied an apprentice to Price, who then engaged the apprentice for the ship.

The contract between Price and the respondent on the 1st of January for the purchase of the sixty-fourth share was bonâ fide and not colourable.

The magistrate dismissed the information, holding that the respondent was an "owner" within the exemption in s. 147.

The question for the Court was whether the respondent was an "owner" within the Merchant Shipping Act, 1854, s. 147. (1)

A. L. Smith, for the appellant. The question is whether on the 12th of February, 1881, the respondent was "owner" of the ship, having then no property in the ship, nor anything more than a contract to buy one sixty-fourth share from Price who was not himself the registered owner. Sect. 147 of the Merchant Shipping Act, 1854, is one of a group of sections headed "Engagement of Seamen," and is directed against crimping. If in that section "owner" does not mean registered owner, at least it means one who has a property in the ship. Equity would not enforce a contract for the mortgage of a ship made without the formalities prescribed by the Act: *Liverpool Borough Bank* v. *Turner.* (2) No doubt 25 & 26 Vict. c. 63, s. 3, says that equitable contracts

---

(1) By s. 146, the Board of Trade may grant to such persons as it thinks fit licences to engage or supply seamen or apprentices for merchant ships in the United Kingdom.

Sect. 147: The following offences shall be punishable as hereinafter mentioned (that is to say):

(1) If any person not licensed as aforesaid, other than the owner or master or a mate of the ship, or some person who is bonâ fide the servant and in the constant employ of the owner, or a shipping master duly appointed as aforesaid, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom, he shall for each seaman or apprentice so engaged or supplied incur a penalty not exceeding 20*l.*

(2) 1 J. & H. 159; 29 L. J. (Ch.) 827; affirmed 2 D. F. & J. 502; 30 L. J. (Ch.) 379. 6 Jur. N.S. 635.

7 Jur. N.S. 150.

1881

HUGHES
v.
SUTHERLAND.

shall be recognised, but that section only applies to s. 100 and the second part of the Merchant Shipping Act, 1854. Sect. 147 is in the third part. If the respondent had had a legal property in the ship he would be "owner," but he must have property. No property passes unless there be a bill of sale: *European and Australian Royal Mail Co.* v. *Peninsular and Oriental Steam Navigation Co.* (1); *Union Bank of London* v. *Lenanton* (2); *Stapleton* v. *Haymen.* (3) The case of *Meiklereid* v. *West* (4) which influenced the magistrate, was on a different section.

Besley, for the respondent, referred to *Batthyany* v. *Bouch.* (5)

A. L. Smith, in reply. The Act was passed to prevent the very thing done by the respondent in the present case.

LORD COLERIDGE, C.J. I think the magistrate was right. Sect. 147 of the Merchant Shipping Act, 1854, was passed to prevent crimping, and it does—wisely as I think—interfere with freedom of contract in order to protect a class of persons peculiarly subject to imposition. In construing the section, therefore, it ought not to be narrowed if the matter comes clearly within the mischief.

In 1860, in *Liverpool Borough Bank* v. *Turner* (6) Wood, V.C., held in an elaborate judgment that under an agreement for sale or mortgage not accompanied by the formalities prescribed by the Merchant Shipping Act, 1854, no such interest passed as would justify the Court in decreeing specific performance. That decision was affirmed by Lord Campbell on appeal (7), and the case is therefore of high authority. In 1862, probably because that judgment prejudicially affected the mercantile community, s. 3 of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63) was passed, and by that section it is—not "enacted" —but "it is hereby *declared*" (shewing that in the opinion of the legislature this was always the true construction) "that the expression 'beneficial interest,' whenever used in the second part of the principal Act, includes interests arising under contract and other equitable interests; *and the intention of the said Act* is that

(1) 14 L. T. (N.S.) 704.

(2) 3 C. P. D. 243.

(3) 2 H. & C. 918; 33 L. J. (Ex.) 170. 10 Jur N.S. 497

(4) 1 Q. B. D. 428.

(5) 50 L. J. (Q.B.) 421.

(6) 1 J. & H. 159; 29 L. J. (Ch.) 827. 6 Jur N.S. 935

(7) 2 D. F. & J. 502; 30 L. J. (Ch.) 379. 7 Jur N.S. 150

without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property." Since that Act equitable interests have been recognised, and in *Stapleton* v. *Haymen* (1), Pollock, C.B., and the Barons agreed that an equitable right of property can be created in a ship by an unregistered bill of sale.

In the present case the respondent is an equitable part owner of the ship; he has a contract enforceable in equity to purchase one sixty-fourth share. Then is he "the owner," within the meaning of s. 147? If instead of an equitable interest there had been a legal transfer to him of one sixty-fourth share—however small the interest if it were a legal one—he would be "the owner." Is he so now? I think he is.

In *Meiklereid* v. *West* (2) it was held rightly under a proceeding to enforce an allotment note under s. 169 of the Act, that a person who was the sole registered owner of a ship, but had by charterparty parted not only with the possession of the ship, but with all control over her—though he was in one sense the owner—was not "the owner" for the purpose of being sued upon the allotment note. It is true that was under a different section, but the judgment is effectual to show that "owner" in the Act must be construed with reference to the subject-matter. There is no definition of "owner" in the Act: the meaning, therefore, must depend on the subject matter and the context. In that case the charterer who was the acting owner, ought to have been sued. So in the present case, "the owner" is not necessarily the registered or even the legal owner. It is difficult to suppose that where under a charterparty of a large and important ship for a long period the charterer has a real interest and the whole interest in the ship and crew he could be convicted under s. 147 in a penalty of 20*l.* for every seaman and apprentice whom he engages, and Mr. Smith admitted the difficulty. That consideration seems to show that the section cannot have the meaning which has been contended for. "Owner" must be construed largely, so as to include one who has a real and substantial interest. If the respondent had a legal interest he would be clearly owner, and an equitable owner is on the same footing as a legal.

---

(1) 2 H. & C. 918; 33 L. J. (Ex.) 170.

(2) 1 Q. B. D. 428.

10 June 1897

I think, therefore, that the respondent being the equitable owner of one sixty-fourth share of the ship was the owner within the exception to sub-s. 1 of s. 147, and was not liable to the penalty.

MANISTY, J. I am of the same opinion. By s. 147, sub-s. 1, several persons are exempted from the operation of the clause. Mr. Smith admits that one who had the legal property in the ship, though not registered, would be "the owner" within the exemption. "Owner" there means one who is substantially the owner, having the control and management of the ship. I do not know that a stronger case could be put than that which was put of a demise by charterparty. The exemption in favour of "some person who is bonâ fide the servant and in the constant employ of the owner" points at a person who has an interest in getting a proper crew, because he has the control and management of the ship. A person with no interest in the ship, would not have a servant within the meaning of that exemption. It would be a very serious matter if this were not the right construction, for the section extends to every seaman and apprentice who may be engaged or supplied.

Judgment for the respondent.

Solicitor for appellant: *The Solicitor to the Board of Trade.*
Solicitors for respondent: *Wontner & Sons.*

J. M. M.

THE BRITISH INDIA STEAM NAVIGATION COMPANY *v.* THE COMMISSIONERS OF INLAND REVENUE.

1881
March 17.

Stamp-Duty—Debenture or Promissory-note—33 & 34 *Vict. c.* 97, *s.* 18, *and Sched.*—"*Debenture*"—*Joint Stock Company.*

An instrument issued by a company incorporated under the Joint Stock Companies Acts, 1856 and 1862, purporting upon the face of it to be a "debenture," with coupons for the payment of interest half-yearly attached to it, and containing an engagement on the part of the company to pay "the amount of this indenture" to A. B. or order on a given day, with interest at 5 per cent., is under the Stamp Act, 1870, chargeable with a debenture-stamp of 2*s.* 6*d.*, and not with a promissory-note stamp.

Case stated by the Commissioners of Inland Revenue (hereinafter called "the commissioners") under 33 & 34 Vict. c. 97, s. 19, on the requisition of the British India Steam Navigation Company, Limited, named in the hereinafter mentioned instrument (and hereinafter called "the company"), in order that the company might appeal against the assessment made by the commissioners of the stamp-duty with which the instrument was in their opinion chargeable:—

1. The instrument was in the following form,—

"The British India Steam Navigation Company, Limited.

"Incorporated September, 1856, under the Joint Stock Companies Act, 1856 (1), as the Calcutta and Burmah Steam Navigation Company Limited, and, on change of name, as the British India Steam Navigation Company, Limited, December, 1862, under the Companies Act, 1862. (2)

"Capital subscribed and issued . .	950,000*l.*
"Amount called and paid up . .	566,200*l.*
"Leaving amount to call at this date .	383,800*l.*

"No. 50. Debenture. 50*l.* sterling.

"The British India Steam Navigation Company, Limited, will on the 30th day of November, 1882, pay 100*l.*, the amount of this debenture, to Mr. P. W. Armour, or order, at the City Bank, London, or at the registered office of the company.

"And the said company will also pay to the holder of this debenture interest at the rate of 5*l.* per cent. per annum on the said sum of 100*l.* sterling by equal half-yearly payments on the 30th day of May and the 30th day of November in each year, upon presentation and delivery of the coupons hereto annexed; the first of such half-yearly payments to be made on the 30th day of May, 1880.

---

(1) 19 & 20 Vict. c. 47. (2) 25 & 26 Vict. c. 89.

"In witness whereof the company hath caused two of its directors to set their hands hereto this 30th day of November, 1880.

"P. Macnaughton, Secretary.	W. Mackinnon, W. P. Andrew, } Directors."

At the foot of the instrument were six coupons dated respectively the 30th of May and 30th of November, 1880, the 30th of May and 30th of November, 1881, and the 30th of May and 30th of November, 1882, for interest, in the following form:—"British India Steam Navigation Company, Limited. Debenture No. 50, for 100*l.* sterling. Half-yearly interest 2*l.* 10*s.* payable on the —— day of May, 1880. At the City Bank, London. P. Macnaughton, Sec."

2. The instrument having been stamped as a promissory-note before it was executed, with the duty of 1*s.*, which was denoted thereon by a stamp appropriated by words on the face of it to bills or notes, and is the proper duty with which a promissory-note for 100*l.* is chargeable under the provisions of the Stamp Act, 1870, was on the 2nd of December, 1880, presented on behalf of the company to the commissioners, under the provisions of s. 18 of the Stamp Act, 1870, for their opinion as to the stamp-duty with which it was chargeable: and it was contended by the company that the instrument was chargeable with stamp-duty as a promissory-note, and not otherwise.

3. The commissioners, being of opinion that the instrument in question was not chargeable, under the provisions of the Stamp Act, 1870, with stamp-duty as a promissory-note, but was chargeable under the provisions of that Act with ad valorem duty as a debenture for 100*l.*, assessed the duty thereon at the sum of 2*s.* 6*d.* accordingly; and in conformity with the said assessment the instrument was stamped with a further duty of 2*s.* 6*d.*, which was denoted thereon by an ordinary unappropriated stamp.

4. The commissioners were not of opinion that the instrument was chargeable with stamp-duty as a debenture and also as a promissory-note; and, in the event of the assessment made by them as aforesaid being upheld by the Court, the 1*s.* stamp upon which the instrument was originally written would be allowed for as a spoiled stamp; and, subject to such allowance, the instrument had in conformity with the 18th section of the Act been stamped with a particular stamp denoting that it was duly stamped.

The question for the Court was, whether the instrument was chargeable with the stamp-duty of 2*s.* 6*d.* as a debenture for 100*l.*, or with the stamp-duty of 1*s.* as a promissory-note for 100*l.*

March 16. *Wills, Q.C.* (*Gye,* with him), for the appellants. This instrument falls directly within the definition of a promissory note given in s. 49, sub-s. 2, of the Stamp Act, 1870, " any document in writing (except a bank-note) containing a promise to pay any sum of money," and is chargeable with a stamp-duty of 1*s.*: it cannot be also chargeable with the duty of 2*s.* 6*d.* as a debenture. It is not an instrument under seal. The fact of its being called upon its face a " debenture " cannot alter its legal effect: per Malins, V.C., in *Ex parte Colborne, In re Imperial Land Co. of Marseilles* (1), and per Sir W. Page Wood, and Sir G. Selwyn, LL.J., in *Ex parte City Bank, In re General Estates Co.* (2), where similar instruments were held to be promissory-notes: and see per Martin, B., in *Freeman* v. *Inland Revenue Commissioners.* (3) The Stamp Act gives no definition of " debenture;" nor is any precise definition of the word to be found in any of the dictionaries: it seems to be a word of modern introduction, and more properly perhaps applicable to a charge upon property (4) than to a negotiable instrument. The statute does define " mortgage."

Sir H. James, A.G. (*Sir F. Herschell, S.G.,* and *A. V. Dicey* with him), for the respondents. This is a debenture, and subject to the duty of 2*s.* 6*d.* imposed on a debenture by the Act of 1870.

---

(1) Law Rep. 11 Eq. 478.

(2) Law Rep. 3 Ch. App. 758.

(3) Law Rep. 6 Ex. 101.

(4) As in the case of railway and gas and water companies, and the like.

It is not the less a debenture because it may also answer in some degree to the description of a promissory-note. The only reason why a debenture is usually under seal is, that it is issued by a corporate body, which generally speaking contracts only under seal. The circumstance of the parties calling it a debenture may not be conclusive; but it is entitled to some weight. In *Norton* v. *Florence Land and Public Works Co.* (1), where the question was what was the legal effect of an instrument somewhat similar to this, Sir G. Jessel, M.R., says: "The question is whether the document which they (the company) did issue was a bond or a mortgage. In my opinion it is a bond. First of all, and that is a very strong point as between the parties, they themselves call it a bond." If the document comes both within the definition of a debenture and of a promissory-note, it is chargeable with whichever is the higher duty. This is not in the common form of a promissory-note. No individual or firm signs it as a promiser. In the cases cited the question arose upon the *negotiability* of the instrument, not upon the stamp.

Wills, Q.C., in reply. The Master of the Rolls in the case cited by the Attorney-General was not professing to give a definition of the word "debenture;" the thing he was dealing with was either a bond or a mortgage.

March 17. Grove, J. This was a case stated by the commissioners of inland revenue for the opinion of this Court. The question, though apparently a simple one, and certainly easy to state, is not free from difficulty, inasmuch as the word "debenture," which has somehow crept into the English language, does not appear to admit of any accurate definition. In the several dictionaries which we are in the habit of consulting no satisfactory information is given, and neither of the learned counsel has been able to afford us any. I do not remember the term being used otherwise than in an acknowledgment of indebtedness by a corporate body having power by Act of Parliament or otherwise to increase its capital by borrowing money. The difficulty arises thus:—In the Stamp Act of 1870, "debenture" occurs in the schedule of duties to be charged upon certain instruments in two ways,—"Debentures for securing the payment or re-payment of money or the transfer or re-transfer of stock," and "Debenture or certificate for entitling any person to receive any drawback;" a certain duty being payable in respect of each of these. It is used also in another part of the Act, "mortgage, bond, *debenture*, covenant, warrant of attorney, and foreign security of any kind," upon which certain duties are charged. But there is no definition of debenture in the Act; and, as I have already said, no accurate definition can be found.

---

(1) 7 Ch. D. 332, 337.

In the argument on behalf of the appellants, it was said that this instrument is really a promissory-note and nothing more, that it has all the indicia of a promissory-note, and that the mere use of the word "debenture," which occurs twice in the document itself, and also in each of the coupons attached to it and which are detached for the receipt of interest, cannot make it other than it really is. The learned counsel cited two cases of *Ex parte Colborne* (1) and *Ex parte City Bank* (2), not touching the question of stamp-duty, but touching the question whether a "debenture-bond," in a form very similar to that of the instrument before us, might, as between the parties, be regarded as a promissory-note, two learned equity judges held that the mere calling it a debenture could not alter its character so as to prevent it from being treated as a promissory-note.

Now, if a debenture is a promissory-note, and nothing else, the words in the schedule to which I have referred become practically inoperative, because there is another part of the statute (s. 49) which defines "promissory-notes," and which imposes certain duties upon them; and, if debenture and promissory-note were the same, the same amount of duty would be payable upon each, and the mention of debenture in the schedule under the head "Mortgage" would really have no meaning at all. It is true the statute speaks of two sorts of debenture, one of which might be a promissory-note or in the nature of a promissory-note, and the other which has nothing in it of the nature of a promissory-note. We are therefore called upon to deal with a word which has no absolute, definite, received meaning; and we wished to look at the memorandum of association of the company, to see whether

(1) Law Rep. 11 Eq. 478.

(2) Law Rep. 3 Ch. App. 758.

1881

BRITISH INDIA STEAM NAVIGATION COMPANY *v.* COMMISSIONERS OF INLAND REVENUE.

Grove, J.

the word "debenture" was used in it with any particular sense affixed to it. But we have derived no aid from that document. The best opinion which under the circumstances I can form is, that a debenture, being recognised in the statute, and a different stamp-duty being affixed to it, is by the statute and by the law recognised as something different from a promissory-note. It may be a promissory-note and something more: and I come to the conclusion that this instrument, though in one sense no doubt ambiguous enough to make it a promissory-note, contains matters other than those which are usually contained in promissory-notes. It appears to be issued for a definite sum, and is apparently, in recognition of a loan. The instrument is headed "The British India Steam Navigation Company, Limited," and it gives the date of the incorporation of the company, its former name, the amount of capital subscribed and issued, the amount called and paid up, and the amount left to call. All that, I presume, is stated for the information of persons who may be willing to lend money, which the company no doubt have power to borrow. Then appears the number of the security, the word "Debenture," and the amount secured. That is not the usual form of a promissory-note, which always begins "I promise to pay," &c. Then it goes on to say, "The British India Steam Navigation Company, Limited, will, on the 30th day of November, 1882, pay 100*l.*, the amount of this debenture, to Mr. P. W. Armour, or order, at the City Bank, London, or at the registered office of the company." There, again, the terms are somewhat different from those of a promissory-note: it is not they "promise to pay," but "will pay." The difference may be wholly unsubstantial, because if a man writes "I will pay," it may be interpreted to mean that he promises to pay. We must, however, take the instrument as it is. It then goes on,—"And the said company will also pay to the holder of this debenture interest at the rate of 5*l.* per cent. per annum on the said sum of 100*l.* sterling, by equal half-yearly payments on the 30th day of May and the 30th day of November in each year, upon presentation and delivery of the coupons hereto annexed, the first of such half-yearly payments to be made on the 30th day of May, 1881. Now, then, there does become something like a real distinction between a promissory-note (using the word in its normal sense), and this document, first of all because there is a double promise to pay; not a promise to pay, as in a promissory-note, upon which a promise to pay interest may be legally inferred; but it is a special mode of paying the interest, viz. only to the holder of the debenture. I presume the holder of the debenture would be the person to whom it would pass by Armour's indorsement, and "upon presentation and delivery of the coupons hereto annexed." These coupons are apparently for the purpose of identifying the claims. The number of the debenture is therein stated, the amount is stated, and the amount of interest, and the place at which it is to be paid, and the day it is due; and these coupons are to be delivered by the person who claims the interest from the company when the interest is required to be paid.

Now, it seems to me that all this does make a real difference between what the company here themselves call a "debenture" and a promissory-note. The statute contemplates in debentures something different from a promissory-note, because it imposes upon them a higher rate of duty, not that the thing is not in some sense of the word a promissory-note: but it is a promissory-note and something more. It is a promissory-note with matters attached to it having a purpose in them; and, although the attaching these coupons to the instrument may not make it more or less a promissory-note, it gives a reason why the legislature may have thought fit to impose a greater duty upon these documents than it does upon a promissory-note.

Upon the best consideration, therefore, that I can bring to this case, though there is very little to make one feel certain in one's opinion, turning as it does upon a word which has no defined signification in the present state of the English language, I am of opinion that this instrument is within the meaning of the Stamp Act, 1870, a debenture, and is chargeable with the higher duty of 2*s.* 6*d.* The company may easily avoid the difficulty in future, by omitting the word "Debenture."

LINDLEY, J. I am of the same opinion. If the question were whether this instrument is to bear a stamp applicable to promissory-notes as defined in the Act or no stamp at all, I should say unquestionably it was a promissory-note. It falls within the statutory definition of a promissory-note, a definition inserted with a view to impose a duty upon every document which answers the description: and, when we look at the statutory definition of a promissory note, we find it wide enough to include all sorts of instruments which are taxable under other heads in the schedule. Now, the definition of a promissory-note in s. 49 is this,—"It means and includes any document in writing (except a bank-note) containing a promise to pay any sum of money." That definition is equally applicable to a mortgage or a bond or any other instrument whatever which contains a promise; and, as I say, if the question were whether this instrument is to be charged with stamp-duty or not, I see no answer to the suggestion that it would be chargeable with duty as a promissory-note. But what we have to determine is, whether it is a promissory-note as distinguished from something else. Take the common case of a mortgage: it falls within the statutory definition of a promissory-note, yet nobody would say that it ought to bear a promissory-note stamp.

Looking at the matter from that point of view, let us see what the instrument itself is. I think it would strike any commercial man as something very different from a promissory-note. It is not framed like a promissory-note. It contains various stipulations and conditions which would induce any commercial man to laugh at the idea of its being a promissory-note: it purports to be something else; and it is called a debenture. I do not think the calling it a debenture is conclusive: but it is something; and it is important when you bear in mind that the question we have to consider is, whether that which a commercial man would repudiate as a promissory-note is to be regarded for the purpose of taxation as a promissory-note, or something which it purports to be and is called, viz. a debenture.

Now, what the correct meaning of "debenture" is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures, which are charges of some kind on property. You may have debentures which are bonds; and, if this instrument were under seal, it would be a debenture of that kind. You may have a debenture which is nothing more than an acknowledgment of indebtedness. And you may have a thing like this, which is something more; it is a statement by two directors that the company will pay a certain sum of money on a given day, and will also pay interest half-yearly at certain times and at a certain place, upon production of certain coupons by the holder of the instrument. I think any of these things which I have referred to may be debentures within the Act.

In the case of *Ex parte City Bank, In re General Estates Co.* (1), the question was whether the instrument was negotiable like a promissory-note, that is to say, so as to entitle the holder to prove against the estate of the company, without being affected by rights of set-off; and, having regard to the frame of the instrument, the learned judges who decided that case held that it was a promissory-note for such a purpose as that,—to enable the holder to prove and to make a title as the holder of a promissory-note, so as not to be subject to the equities between the company and his assignor. They do not touch the question of stamp: and, when we come to consider, not whether this instrument is a promissory note or stampable as such, and not to be stamped as something else, viz. a debenture; but when we have to determine which of the two it is,—it being conceded that it is one or the other,—I come to the conclusion that it is that which it purports to be. And there are commercial advantages which will accrue to the company from our so holding. Some people fancy there is magic in the word debenture,—that debentures are wonderful things to have. But there are other advantages which will result to the company from our holding this instrument to be a debenture: it will take it out of the prohibition in the Stamp Act as to promissory-notes. If it were a promissory-note, it could not be stamped after it was signed; if a debenture, it could: so that there are advantages legal as well as commercial in our holding it to be a debenture.

Upon the whole I am of opinion that this instrument is a debenture and not a promissory-note, although I quite agree that

---

(1) Law Rep. 3 Ch. App. 758.

1881

British India Steam Navigation Company *v.* Commissioners of Inland Revenue.

it would be a promissory-note if it were nothing else. For these reasons, I concur in the judgment pronounced by my Brother Grove.

Judgment for the respondents, leave to appeal refused.

Solicitor for appellants: *J. P. Sweetland.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

J. S.

April 13.

[IN THE COURT OF APPEAL.]

ALDERSON *v.* MADDISON.

Contract—Representation influencing Conduct—Interest in Land—Verbal Promise to devise such Interest—Part performance—Statute of Frauds, s. 4.

18 QBD 153 4
155–7–8–9
160

The plaintiff as heir-at-law of an intestate claimed the title deeds of the intestate's farm of which the defendant had taken possession on his death. The defendant counter-claimed a declaration that she was entitled to a life estate in the farm, and to retain the title deeds for her life. The jury found that the defendant was induced to serve the intestate as his housekeeper without wages for many years, and to give up other prospects of establishment in life by his promise, which was a verbal one, to make a will leaving her a life estate in his farm, if and when it became his property:—

Held, reversing the judgment of Stephen, J., that neither the continuance of the defendant in the service of the intestate, nor the fact that the latter had executed a document which he intended to operate as a will in the defendant's favour, but which failed to take effect from want of proper attestation, was any evidence of a sufficient part performance of the parol agreement between the intestate and the defendant, upon which the defendant's counterclaim was based, to exclude the operation of the Statute of Frauds, and therefore that the 4th section of that statute was an answer to the counterclaim.

Affirmed by H/L. 8 app cas 467 H.L

Appeal by the plaintiff from the judgment of Stephen, J., at the trial at the Durham Summer Assizes in 1879. (1)

The facts and the arguments are fully stated in the judgment of the Court.

Bagshawe, Q.C., and *Gainsford Bruce* (*Ridley*, with them), for the plaintiff.

---

(1) 5 Ex. D. 293.

James G. Wood, and *J. Edge*, for the defendant. The following authorities were cited in addition to those referred to in the judgment: *Lester* v. *Foxcroft* (1); *Pickard* v. *Sears* (2); *Hammersley* v. *De Biel* (3); *Caton* v. *Caton* (4); *Nunn* v. *Fabian* (5); *Coles* v. *Pilkington* (6); *Freeman* v. *Cooke* (7); and *Prole* v. *Soady*. (8)

Cur. adv. vult.

April 13. The following judgment of the Court (Bramwell, Baggallay, and Brett, L.JJ.) was delivered by

BAGGALLAY, L.J. The plaintiff in this action is the heir-at-law of one, Thomas Alderson, who at the time of his decease was the owner in fee simple of a farm in the North Riding of the county of York, known as the Manor House Farm.

Thomas Alderson died on the 16th of December, 1877, intestate, and upon his decease, the defendant, who had for some years been in his service as housekeeper, took possession of the title deeds relating to the farm, and refused to give them up to the plaintiff, who therefore commenced the present action to recover possession of the deeds. These facts are not disputed by the defendant, but it is alleged by her that she entered the service of Thomas Alderson in the year 1845 when she was sixteen years old, and that having remained in his service, first as general servant, and afterwards as housekeeper until the year 1860, and her wages being then considerably in arrear, she determined to quit his employment, but that he, being an old man and very anxious that she should continue with him, promised her that if she would remain with him, and continue to serve him for the rest of his life, and would forbear to press for her wages, he would, in satisfaction of the arrears of her wages and in lieu of future wages, leave her a life interest in the Manor House Farm, which he expected his uncle would leave him, and in any other property of which he might be possessed, and would effectually secure such life interest to her; and that it was mutually agreed between them to that effect. It is further alleged by the defendant that the said Thomas Alderson from time to time, and after he had succeeded to the Manor House Farm repeated the promise he had so made to her in 1860, and that, relying upon his promises and upon the agreement so come to between them, she continued to serve him as his housekeeper until his death, and did not press him for payment of any wages.

---

(1) 1 W. & T. 5th ed. 828.
(2) 6 Ad. & E. 469.
(3) 12 Cl. & F. 45.
(4) Law Rep. 2 H. L.127.
(5) Law Rep. 1 Ch. 35.
(6) Law Rep. 19 Eq. 174.
(7) 2 Ex. 654.
(8) 2 Giff. 1.

5 Jan H S 1883

These allegations were made by the defendant in her statement of defence, and she thereby submitted that she was entitled to an estate for life in the Manor House Farm and to the custody of the title deeds which were sought to be recovered from her in the action; and by way of counterclaim, she claimed a decree or declaration to the like effect; she further, and in the alternative, claimed to be entitled to retain the deeds until she had been paid all wages due to her from the said Thomas Alderson, or a fair and reasonable remuneration for her services. It is admitted by the defendant that the promises so alleged to have been made by the said Thomas Alderson, and the agreement so alleged to have been entered into between them were by parol only. The plaintiff, by his reply and by way of defence to the counterclaim, claimed the benefit of the Statute of Frauds.

The action was tried before Mr. Justice Stephen at the Durham Summer Assizes in 1879; the defendant was examined at the trial, and verified by her own testimony the several allegations to which reference has been made. It was further proved that some time after Thomas Alderson became the owner of the Manor House Farm, he signed a document which purported to be a will, and by which he purported to leave the said farm to the defendant for life, subject to the payment of a small annuity, but that after his death it appeared that the document so signed by him was not duly attested so as to operate as a will.

At the request of counsel on both sides, Mr. Justice Stephen put the following question to the jury:—"Was the defendant induced to serve Thomas Alderson as his housekeeper without wages for many years, and to give up other prospects of establishment in life by a promise made by him to her to make a will leaving her a life interest in the Manor House Farm, if and when it became his property?" The jury having answered this question in the affirmative, the learned judge reserved the effect of the evidence and of the finding of the jury for further consideration, and eventually gave judgment for the defendant, making a declaration as claimed by the first alternative of the defendant's counterclaim.

The judgment of Mr. Justice Stephen appears to have been based upon the following considerations: that there was a contract between Thomas Alderson and the defendant to the effect alleged by her; that such contract whether it could or could not have been enforced by him, was based upon a sufficient consideration to make it binding upon him, and upon his estate in the possession of the plaintiff to whom it passed on his decease; that such contract was completely performed on the part of the defendant, and by reason thereof the provisions of the Statute of Frauds had no application. From that judgment of Mr. Justice Stephen the present appeal is brought.

In support of the appeal it has been contended—1. That that which has been treated by Mr. Justice Stephen as a contract originally binding upon Thomas Alderson, was at most a representation made by him of his intention by which possibly the defendant might have been influenced; but in respect of which she could not have enforced any demand against Thomas Alderson in his lifetime, or against his estate after his decease; 2. That assuming it to have been the intention of the parties to enter into a binding agreement, the terms of that alleged by the defendant to have been come to between them were so vague and uncertain in their scope and effect that neither party, in the lifetime of Thomas Alderson, could have obtained a decree for specific performance, even though there had been a memorandum in writing of its terms signed by both of them; 3. That inasmuch as the alleged contract related to land, the circumstance that there was not any memorandum or note thereof in writing, within the intent and meaning of the 4th section of the Statute of Frauds, was a sufficient answer to the counterclaim of the defendant; and 4. That there had not been any part performance sufficient to take the case out of the operation of the statute.

We are of opinion that the 3rd and 4th of the reasons so assigned by the plaintiff are well founded, and are sufficient to support his appeal. It is not disputed that the 3rd must prevail

1881

ALDERSON
v.
MADDISON.

Baggallay, L.J.

unless the 4th is rejected. The question, then, which we have to determine is, whether there has been such a part performance of the alleged agreement as to exclude the operation of the Statute of Frauds. This is the question which has been chiefly discussed before us, though it would appear, from the judgment of Mr. Justice Stephen, that the question more particularly argued before him was, to use his own form of expression, whether the defendant made a bargain with Thomas Alderson, or took her chance of his keeping his word.

Now, it is a well-recognised rule, that if in any particular case the acts of part performance of a parol agreement as to an interest in land are to be held sufficient to exclude the operation of the Statute of Frauds, they must be such as are unequivocally referable to the agreement; in other words, there must be a necessary connection between the acts of part performance and the interest in the land which is the alleged subject-matter of the agreement; it is not sufficient that the acts are consistent with the existence of such an agreement, or that they suggest or indicate the existence of some agreement, unless such agreement has reference to the subject matter. As was said by Lord Hardwicke in the case of *Gunter* v. *Halsey* (1), they must be such as could have been done with no other view or design than to perform the agreement. Thus payment of part, or even of the whole, of the purchase-money is not sufficient to exclude the operation of the statute, unless it is shewn that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement.

On the other hand, the admission into possession of a stranger is, speaking in general terms, a sufficient part performance, for it is not explicable upon any other supposition than that it has resulted from a contract in respect of the land of which possession has been given. Again, the continuance in possession of a tenant is not in itself a sufficient part performance of a parol agreement for the purchase from the landlord, for it is equally consistent with a right depending upon his tenancy.

Let us then apply this test to the acts of part performance relied upon by the defendant in the present case; they are limited to her continuance in the employment of Thomas Alderson until

(1) Amb. 586.

his death without being paid the wages due to her in 1860, and without receiving any remuneration for her subsequent services. It cannot with any show of reason be contended that such continuance in his service was referable only to an agreement that he would leave her a life's estate in his property, or, indeed, that it was referable to any agreement whatever. Other considerations for the continued service of the defendant will readily suggest themselves, and in particular that to which we have already referred as having been suggested by the plaintiff in argument, that the defendant had been induced to continue in the service of Thomas Alderson by an expectation, founded possibly upon a representation made by him of his intentions, of some future benefit to be derived under his will, should she continue in his service. The circumstance that Alderson subsequently executed a document which he intended to operate as a will in the defendant's favour carries the case no further; it is as consistent with a previous expression of intention as it is with his having previously entered into an agreement, and it is equally consistent with his never having done either the one or the other. For the reason then that there is not in the present case any evidence of a sufficient part performance of the parol agreement upon which the defendant's counterclaim is based, to exclude the operation of the Statute of Frauds, we are of opinion that the plaintiff's appeal should be allowed.

The cases of *Loffus* v. *Maw* (1) and *Ungley* v. *Ungley* (2) were much pressed upon us by the counsel for the defendant, as supporting a conclusion different from that at which we have arrived; but it will be found upon an examination of those cases that they differ materially in their circumstances from that under consideration. In *Loffus* v. *Maw* (1) a codicil had been executed giving to the plaintiff, by way of declaration of trust of property devised to trustees, the benefit previously promised, and such codicil having been produced and explained to the plaintiff, she, upon the faith of the provision apparently so made for her, continued in the testator's service until his death. By a subsequent codicil he made void the trusts in her favour declared by the previous codicil, and directed that it should be read as if her name had not been mentioned. The Vice-Chancellor decreed that the trusts declared in her favour by the earlier codicil should be carried into effect by the devisees in trust. The benefit of the Statute of Frauds had been claimed by the defendants, but the Vice-Chancellor summarily disposed of the objection by saying that the Statute of Frauds had no application to such cases. The question of the operation of the statute being excluded by reason of part performance was in no way entertained by him. Whether this case was rightly decided it is not for us now to express an opinion, but it is no authority for the defendant's contention. In *Ungley* v. *Ungley* (1) a father immediately after the marriage of his daughter, and in pursuance of a verbal promise before the marriage, put the daughter and her husband into possession of a leasehold house of which he was the owner, but which was subject to a charge in favour of a building society payable by instalments. The father paid the instalment which became payable during his life, and the balance, 110*l.*, became due shortly after his death. The Court of Appeal affirming, Vice-Chancellor Malins held that the possession given by the father excluded the operation of the Statute of Frauds; as the agreement was to give the house free from encumbrances, and that consequently the 110*l.* was payable out of the father's estate, there is nothing in this decision inconsistent with the conclusion at which we have arrived in the present case, for, as we have already observed, admission into possession has been recognised as a part performance sufficient to exclude the operation of the statute.

---

(1) 3 Giff. 592; 32 L. J. (Ch.) 49. 8 Jur. N.S. 607 (2) 4 Ch. D. 73.

Having arrived at this conclusion it is perhaps unnecessary that we should express any opinion as to the other reasons which have been urged on behalf of the plaintiff in support of his appeal. Mr. Justice Stephen was of opinion that a contract had been concluded between Thomas Alderson and the defendant. We do not dissent from that view, but the case well illustrates the wisdom of the legislature in enacting the Statute of Frauds, as well as the propriety of the conclusion at which Courts of Equity, through whose jurisdiction the strictness of the law has been hitherto moderated, have in more recent times arrived, that the application of the principle of allowing acts of part performance

(1) 4 Ch. D. 73.

1881

ALDERSON v. MADDISON.

Baggallay, L.J.

to exclude the operations of the statute should not be extended. Without intending or desiring to suggest any doubt as to the perfect truthfulness of the defendant's statement, it is impossible not to feel to how great an extent the determination of the terms of the parol agreement is dependant upon the testimony of an interested witness, speaking of a transaction which took place many years ago and after the death of the only other party to the transaction, we have only further to observe that, upon the assumption that such a contract as that alleged by the defendant was in fact come to between her and Thomas Alderson, it was a contract which in our opinion could not have been enforced by either party to it during the life of Thomas Alderson. As regards the obligation upon the defendant it was a contract for personal service, for the specific performance of which a decree could not be obtained, though in some cases, as in that of *Lumley* v. *Gye* (1) a Court of Equity would restrain by injunction the doing of an act contrary to the terms of the agreement, and in that way obtain in substance a performance of it. Nor could a Court of Equity any more than a Court of Law compel a man to make a will in accordance with any promise or agreement previously given or entered into by him. But there is a further objection to the claim of the defendant to have a declaration as against the plaintiff that she is entitled to a life interest in the Manor House Farm, she is claiming to have the same benefit as if Thomas Alderson had made a will in her favour; Mr. Justice Stephen pointed out in his judgment that to contend that Alderson's heir-at-law was estopped by Alderson's conduct from disputing the validity of the unattested document would be to repeal the Statute of Wills. It appears to us that to give the same effect to a man's promise or agreement to make a will, as to a will made by him in pursuance of such promise or agreement, would be indirect contravention of the provisions of the statute.

The alternative claim of the defendant was hardly pressed upon us; if any wages or other remuneration were due to her at the decease of Alderson, her claims in respect thereof could not be enforced against his heir-at-law in this present action, at any rate as the pleadings are at present framed.

(1) 2 E. & B. 216. 17 Jun 1882]

1881

ALDERSON v MADDISON.

Baggallay, L.J.

We should have been glad if some arrangement could have been come to under which the defendant might have received from the estate of Alderson a reasonable remuneration for the many, and those the best, years of her life spent in his service, and apparently without any adequate remuneration — that he intended to remunerate her is beyond doubt, and his intentions have been frustrated by an accident. The result we cannot but regret.

Judgment reversed.

Solicitors for plaintiff: *Ridsdale, Craddock, & Ridsdale, for Watson, Barnard Castle.*

Solicitors for defendant: *Rogerson & Ford, for Proud, Bishop Auckland.*

W. P.

May 12.

[IN THE COURT OF APPEAL.]

THE GREAT WESTERN RAILWAY COMPANY *v.* THE RAILWAY COMMISSIONERS AND JAMES BROWN.

Railway Company—Regulation of Railways Act, 1873, 36 *&* 37 *Vict. c.* 48—*Railway and Canal Traffic Act,* 1854 (17 *&* 18 *Vict. c.* 31), *s.* 2—*Excessive Charges for Conveyance of Passengers by Railway—Neglect to afford "Reasonable Facilities"—Jurisdiction of Railway Commissioners.*

The mere fact that railway companies make charges for the conveyance of passengers in excess of those authorized by their special Acts, but without any undue preference, is not a breach of their obligation under 17 & 18 Vict. c. 31, s. 2, to "afford according to their respective powers all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively and for the return of carriages, trucks, boats, and other vehicles." And the Railway Commissioners have no jurisdiction to grant an injunction to restrain the making of such excessive charges.

Semble, per Brett, L.J., and Cotton, L.J., that if the overcharges were of such an amount and of such a nature that they had the effect, or it could be presumed that they were made with the intention, of preventing the use by passengers of particular trains and stations, the Commissioners might have jurisdiction to entertain a complaint in respect of them as being a refusal of "facilities" within the meaning of 17 & 18 Vict. c. 31, s. 2.

RULE calling upon J. Brown to shew cause why a writ of prohibition should not issue to restrain further proceedings in the

Sc on action brought by complainant agt Ra
way Co Brown v GWR 9 QBD. 744

1881

GREAT WESTERN RAILWAY CO. *v.* RAILWAY COMMISSIONERS.

matter of an application by him to the Railway Commissioners against the Great Western Railway Company.

It appeared upon affidavit that the application stated that by the Great Western Railway Amendment and Extensions Act, 1847 (10 & 11 Vict. c. ccxxvi.), s. 49, it is enacted that the maximum rate of charge to be made by the company for the conveyance of passengers along the railway, including the tolls for the use of the railways and of carriages, and for locomotive powers and every other expense incidental to such conveyance, except Government duty, shall not exceed the following sums :—

For every passenger conveyed in a first class carriage by an express train, the sum of twopence halfpenny per mile.

For every passenger conveyed in a second class carriage by any express train, the sum of one penny three-farthings per mile.

For every passenger conveyed in a first class carriage by any other train, the sum of twopence per mile.

For every passenger conveyed in a second class carriage by any such other train, the sum of one penny halfpenny per mile.

For every passenger conveyed in a third class carriage by any such other train, the sum of one penny per mile.

That in contravention of the Act the company charged for the conveyance of a first class passenger by express train from Paddington to Swindon, a distance of seventy-seven miles, the sum of 17*s.*, the legal fare being 16*s.* 0*d.* 5, and adding the Government duty of 5 per cent., 0*s.* 9·62*d.*, shewing that the excess charged was 0*s.* 1·88*d.* That with respect to second class fares by express train to Swindon, 12*s.* was charged, the legal fare being 11*s.* 2·75*d.*, and adding the Government duty of 5 per cent., 0*s.* 6·75*d.*, shewing an excess fare of 0*s.* 2·50*d.*, equivalent to 2½*d.* That the company charged for the conveyance of a first class passenger by any other or ordinary train from Paddington to Reading, a distance of thirty-six miles, 6*s.* 4*d.*, whereas the maximum charge allowed by their Act was 6*s.*, and adding the Government duty of 5 per cent. 0*s.* 3·6*d.*, shewing an excess charge 0*d.* 4 or 4-10ths of a penny. In all, twenty-three instances were given on which there were excessive charges by the company to the extent of fractions of a penny.

The application concluded by praying the Commissioners for an order enjoining the company to desist from any further continuance of the whole or any part of the charges above-mentioned, as the Commissioners should deem right, and not to subject the applicant to any further continuance of these illegal charges which he had been subjected to and paid over a long series of years.

Feb. 26. *Sir H. James, A.G.*, and *Sir F. Herschell, S.G.* (*A. L. Smith,* and *J. H. Balfour Browne,* with them), shewed cause. It must be taken as admitted that the company have charged tolls for passengers in excess of those prescribed by their special Act, and it is immaterial that the amount of the excess is small. The case upon principle is the same as if the company had demanded fares so extravagant as practically to exclude passengers from their line. Under 17 & 18 Vict. c. 31, s. 2, there is an obligation upon railway companies to afford, according to their respective powers, all reasonable facilities for the receiving, forwarding, and delivering of traffic upon their railway (s. 1, making "traffic" include passengers and their luggage), and this is wholly distinct from the obligation to give no undue preferences: *South Eastern Ry. Co.* v. *Railway Commissioners* (1), per Selborne, L.C. The refusal to carry the petitioner upon payment of the legal fare is a refusal to afford him reasonable facilities, and gives the Railway Commissioners jurisdiction. In *Chatterley Iron Co.* v. *North Staffordshire Ry. Co.* (2), the Court of Queen's Bench held that the Commissioners had power to issue an attachment against the railway company for charging higher tolls for goods than they were entitled to charge. In *Aberdeen Commercial Co.* v. *Great North of Scotland Ry. Co.* (3), the Court of Session in Scotland entertained a complaint to the effect that the defendant company charged the applicants and other traders higher tolls for merchandize than was allowed by their special Act, and were thereby refusing to afford reasonable facilities within the meaning of s. 2, no question of undue preference being raised. Refusing tickets to passengers except upon payment of an unauthorized

(1) 6 Q. B. D. 586, at p. 592.

(2) 3 Nev. & Macn. 238.

(3) 3 Nev. & Macn. 205.

1881

GREAT WESTERN RAILWAY CO.
v.
RAILWAY COMMISSIONERS.

charge is placing an unreasonable obstacle in their way, and is equivalent to a refusal to afford them facilities.

R. E. Webster, Q.C., and *R. S. Wright*, in support of the rule. No application like the present, unsupported by any charge of undue preference, has ever been made to the Railway Commissioners. The Act 17 & 18 Vict. c. 31, was not intended to afford redress for wrongs, such as excessive rates or charges, for which there was already a recognised legal remedy by action, or by information of the Attorney General: *Bennett* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1), per Cockburn, C.J., and Byles, J. In the *Attorney General* v. *Great Northern Ry. Co.* (2), Kindersley, V.C., expresses his opinion that the operation of the Act was limited to cases where railway companies have given greater advantages to some persons than to others. The words of 17 & 18 Vict. c. 31, s. 2, that companies are to afford "all reasonable facilities for the receiving and forwarding and delivering of traffic upon the railways worked by the companies, and for the return of carriages, trucks," &c., shew that by the word "facilities" was meant facilities in the use of the stations of the different companies, and that it was not meant to apply to rates and charges. In *Aberdeen Commercial Co.* v. *Great North of Scotland Ry. Co.* (3), the applicants complained of having been forced to pay charges higher than those imposed upon other traders, and the decision of the Court of Session was based upon undue preference.

Cur. adv. vult.

April 9. The following judgments were delivered:—

FIELD, J. This is an application by the Great Western Railway Company for a writ of prohibition, prohibiting the Railway Commissioners from proceeding to make any order upon the application of James Brown against them, under 17 & 18 Vict. c. 31. The application is rather a remarkable one; for the value of the subject-matter of the complaint only amounts in some cases to three-tenths of a penny, although it may be that even for three-tenths of a penny the machinery of the Railway Commissioners is as much at the command of a petitioner who complains

---

(1) 6 C. B. (N.S.) 707.

(2) 1 D. & Sm. 154, at p. 163.

(3) 3 Nev. & Macn. 205.

1881

GREAT WESTERN RAILWAY CO. v. RAILWAY COMMISSIONERS.

Field, J.

of having been injured to that amount as where the amount is larger. The applicant states in his application, that under their special Act the company have a right to charge certain rates and fares, and then he proceeds to set out in a table a number of rates which have been charged to him by the railway company. To take an illustration—the first is a penny decimal 88; and then he goes through a series of altogether twenty-three cases—one I see as low as decimal 78 of a penny, and he prays for an order enjoining the railway company to desist from any further continuance of the whole or any portion of the charges enumerated in his application, as the Railway Commissioners shall in their judgment deem right and proper, and not to subject him to any further continuance of those illegal charges. He bases his application on the ground that this action of the railway company is in contravention of 17 & 18 Vict. c. 31, s. 2. Now, in order to ascertain the true construction of that section, I think I had better take what the Lord Chancellor said in *South Eastern Ry. Co.* v. *Railway Commissioners* (1), instead of reading the Act of Parliament itself, because it is a judicial exposition of that section and of the meaning to be put upon it. The Lord Chancellor says:—" What then are the obligations imposed on railway companies by this statute? They are contained in the second section, and are substantially three in number: First, a positive obligation to afford, according to their respective powers, all reasonable facilities for the receiving, and forwarding, and delivering, of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return," and so on. The Lord Chancellor, therefore, and in the Court below, Lush, J., agree in dividing the second section into three distinct branches. The Lord Chancellor goes on to say that traffic, according to the interpretation clause, includes passengers and their luggage, that the " definition clause also says that 'railway' includes every station of or belonging to such railway company, and used for the purposes of such traffic;" that the second obligation is to give no undue preference, and the third is to do whatever may be necessary to enable the company's own line, and any other line connected with or having a terminus near it, to be used by the public as continuous lines of communication."

(1) 6 Q. B. D. 586.

Now in the present case no complaint whatever is made of undue preference. Mr. Brown says: "You charge this excess to me; it is a grievance which I have been subjected to for years, but I do not say there is any partiality or undue preference, nor does my case come under the third branch either. My case, therefore, must, ex concessis, be found in the first branch of the section, and I claim that the Railway Commissioners are entitled to make an order on my complaint, because I say that the railway company has not afforded me reasonable facilities for the receiving and forwarding me as a passenger."

It therefore becomes necessary to consider what the meaning of that word "facilities" is, used as it is in collocation with the other words in the section.

Mr. Brown's complaint—that he has been compelled to pay three-fourths of a penny more than he ought to have paid—is a complaint, no doubt, any county court had power to decide, and, if they thought fit, make the railway company pay it back, or if any question of importance were involved, in like manner this Court would have power to draw that case to itself, and consider whether the fare charged was within the powers of the railway company or not. Similar questions of very considerable nicety and magnitude on principle arise, although the amount of the particular charge may be small, and I am not aware that there would be any difficulty whatever in any of the ordinary divisions of the High Court of Justice entertaining such a complaint.

There have been only three cases of any great importance, if I remember rightly, in which this first branch of s. 2, has been under discussion in the courts. The well-known series of cases in which Mr. Baxendale was complainant, as well as others, are all cases of undue preference. But the portion of the section that we are now considering has nothing whatever to do, as it seems to me, with any invasion of personal rights of that description, nor is the application so framed as to bring itself under the words which deal with railway stations and traffic arrangements. Now in the case of *South Eastern Ry. Co.* v. *Railway Commissioners* (1) the question was one purely of facilities with reference to matters of the latter description. Nobody can entertain any doubt, I

(1) 6 Q. B. D. 586.

suppose, that if a railway company have a station at a particular place, they are bound to give reasonable facilities by trains and by proper arrangements at proper hours to forward passengers as well as goods, and I can very well understand that there would be no difficulty at all in holding that the Railway Commissioners have jurisdiction in respect to such facilities. But then that is not the complaint here.

The present case is this:—A man says, "You have charged me more than you ought to have charged me; therefore I ask for an injunction forbidding you from ever charging me more than you ought." It was argued that if the company are bound to find a man trains, they are bound to find him a convenient station where he can get into his carriage; and they are bound to find him trains which shall be convenient to him; and then it was argued is not it a refusal of facilities to tell a man that you will not carry him unless he will pay a fare enormously in excess of what is authorized? But I must confess I am unable to put upon the word "facilities" in this branch of the section, so large a meaning. Facility, I think, must be with reference to—I do not know how to express it—but I had better say with reference to those matters which were discussed in the South Eastern case. There was not much in that case bearing upon the present point, except the language of Brett, L.J., who says, dealing with the meaning of the word "facilities:" "Their jurisdiction" [that is the Railway Commissioners' jurisdiction] "was further confined to this, that they could only properly deal with matters which might facilitate or impede the receiving, forwarding, or delivering of passengers or goods upon or from the existing railways or stations; they had no jurisdiction to entertain or deal with matters otherwise affecting passengers and goods." Whether the Lord Justice meant it in that limited sense I do not know. I think he did. Therefore, so far as it goes, it is an authority against the jurisdiction of the Railway Commissioners in this respect. Then it is said there was a decided case on the point, the case of *Aberdeen Commercial Company* v. *Great North of Scotland Ry. Co.* (1) It was said that that was an authority, although not strictly binding on us, but yet a very high authority, indeed, of the Court of Session, and one to which, if in point, I should pay the greatest possible respect. Now, speaking generally, the question in that case arose in this way—some one complained that the railway company had formerly carried for him manure, and they had all at once stopped and said, "Now we have made up our minds that we will not be common carriers of manure any longer, and you must pay us a special rate," and that special rate was more than the maximum rate which they had the power to impose if they were acting as common carriers. Thereupon the applicant applied for relief to the Railway Commissioners, and the point of law was to be raised by a special case, and accordingly a special case was stated, and the question which was proposed by the company to be stated was this: "The first question was whether the Railway Commissioners had any jurisdiction to entertain the application simply and only on the ground that the respondents have charged higher rates and tolls than they have by their Acts of Parliament power to charge." It seems to me that if the Court of Session had decided that question or answered that question in the way that was proposed, this case would have been an authority in point on the present application, because that does seem to have raised simply and neatly the question now before the Court, which is whether the mere charging the applicant more than the maximum rate authorized to be taken by a railway company gives the Railway Commissioners any jurisdiction to entertain the application; but the Railway Commissioners, when they came to settle the case, declined to have the first question stated in that way, and they altered the question into this shape: "In pursuance of the said application, we have stated the foregoing case for the opinion of the Court of Session in Scotland upon the following questions: —Whether our determination that a railway company does not afford, according to its powers, all reasonable facilities within the meaning of s. 2 of the Railway and Canal Traffic Act, 1854, if it makes illegal or excessive charges for the conveyance of traffic, is or is not in accordance with the true construction of that section?" Therefore in that question they put in, and purposely put in, the words "illegal" as well as "excessive." In one sense, no doubt, an excessive charge is illegal, but there are many charges which are not excessive which are also illegal. A rate charged by way of undue preference is illegal. Therefore that question ceased to be the neat and simple question which the company wanted to raise for the opinion of a Court of Law, but it involved, or might be taken to involve, the discussing of the question whether or not in other respects than the mere excess the charge was an illegal one, as being an undue preference. Accordingly the case was argued, and then the case was put in this way before the Court of Session. They said, "This talk about ceasing to be a common carrier is a blind, you are common carriers really. You pretend to us you are not, because you want the petitioner to pay more than your maximum, but in point of fact, all this time you are acting as common carriers for the Corporation of Aberdeen. You are carrying their manure, precisely the same traffic as we want you to carry, and you are doing that at common carrier's rates." Therefore they said it was a mere blind, and so it was, I have no doubt. When you come to see the reasons of the judgment in the Court of Session, particularly Lord Shand's, it seems to me, so far from determining the proposition that the excessive charge is enough to give a jurisdiction to the Commissioners, they included in their judgment the question of undue preference and illegal charge in that respect, so that there was no doubt whatever about the jurisdiction of the Railway Commissioners.

---

(1) 3 Nev. & Macn. 205.

Upon the best construction I can give to the Act of Parliament, and upon principle, I think that Mr. Brown's complaint is not one over which the Railway Commissioners have jurisdiction, and the writ of prohibition must issue.

MANISTY, J. I am of the same opinion, and I think this is one of the most extraordinary applications that have ever come under the consideration of any Court. The applicant seeks to put himself forward as if he were really the relator in an information by the Attorney General, because it is not merely as regards himself, but he goes into twenty-three cases, in which he says that the company is in the habit of charging an excessive toll—a question which may involve extremely difficult points. I will take an instance which the applicant puts forward as one of his grievances. He begins by saying that by the Act of Parliament the company can charge for every passenger conveyed in a first-

1881

GREAT WESTERN RAILWAY CO.
v.
RAILWAY COMMISSIONERS.

Manisty, J.

class carriage, by any other train than an express train, the sum of 2*d.* per mile; and his allegation is, that in contravention of the Act they made a charge of 17*s.* for the conveyance of first-class passengers to Swindon, which, he says, is a distance of seventy-seven miles, neither more nor less. Twenty yards more or less may make all the difference, and it is a curious thing that in all the cases he mentions the distance is a precise mile—it is not a fraction of a mile, they are all cases of miles absolutely. Take this one. He says it is seventy-seven miles, and the company charge an excess of 1·88*d.* Now, if it is a few yards over seventy-seven miles, a nice question arises, whether they have not the right to charge the whole 2*d.* for the distance over that seventy-seven miles. They are allowed 2*d.* per mile. There is nothing said there as to a part of it. If it is, say, a mile-and-a-half, are they entitled to charge 3*d.*, or are they entitled to charge as at the rate of two miles? But it is not only that, the complaint goes into the minutest questions. Take, for instance, the journey to Reading; he says they charge four-tenths of a penny too much. Now, there is no coin of the realm that represents such a sum. What are they to charge? What may they charge? Where it is over the mile for the excess of four-tenths of a penny, may they charge a penny for the excess, or may they charge the whole sum of 2*d.*?

I agree, entirely apart from these observations, that it would be straining the language of the 2nd section of the Railway and Canal Traffic Act, namely, that the company should, according to their powers, afford all reasonable facilities for receiving, forwarding, and delivering passengers, beyond all ordinary meaning if you were to apply it to such a case as this. Would it not be straining the language of the Act beyond anything that is rational to say that these words have reference to the rate of charge which the company is entitled to make for a passenger travelling on their line?

In a case which went to the House of Lords very lately, *Pryce* v. *Monmouthshire Railway and Canal Company* (1), the two questions raised were these: By the special Act the company had a power to charge at the rate of so much a mile, and they also had a right to charge for a fraction of a mile beyond four miles. Then it was said that that being so, they had no right to charge for the fraction of a mile within the four miles. That was one point. Another point was that they were entitled to make a reasonable charge for stopping. Well, that is a similar question to those in the present case. If the Railway Commissioners have the right to go into this, they have a right to go into a question of what would be a reasonable charge for stopping. Now, that question first was raised in a case which went to the Divisional Court, and then to the Court of Appeal, and ultimately was carried to the House of Lords on two points, both on the point of the fraction of the mile and the point as to stopping.

---

(1) 4 App. Cas. 197.

I cannot refer to anything that illustrates the difficulty and importance of this question more than that case. It seems to me that it would be contrary to all reason to construe these words in the second section in the way the Railway Commissioners seek to construe them, and that we ought to decide that the Commissioners have not jurisdiction.

Order for prohibition granted.

A. P. S.

The Railway Commissioners appealed.

Sir H. James, A.G., and *Sir F. Herschell, S.G.* (*A. L. Smith,* and *J. H. Balfour Browne,* with them), for the Railway Commissioners.

R. S. Wright (*R. E. Webster, Q.C.*, with him), for the Great Western Railway Company.

The same arguments were urged as in the Court below.

May 12. BRAMWELL, L.J. I think this judgment must be affirmed. I do not think that this case is within the first words of the second section of the Act 17 & 18 Vict. c. 31. What I understand the applicant Mr. Brown to complain of is, that an excessive charge is made by the company for the conveyance of passengers, not excessive in the sense of outrageous or extortionate, but in excess of what the company are entitled to demand. He does not say that it is made for the purposes of preventing traffic, or that it is of such an amount that it is calculated to prevent traffic. All he says is that it is wrong, being in excess of what the company have a right to charge.

Now, before I address myself to the particular words of the section, I must say that I think one ought not to suppose that the Legislature intended to give to the Commissioners a jurisdiction in matters which could be quite as well exercised by the ordinary Courts of Justice. The Attorney General, however, says, that by their injunction the Commissioners can put a stop to the continuance of undue charges. Well, but practically if the courts of law decide the charges to be undue, such charges are put a stop to, because railway companies do not go on making them with a certainty that they will be beaten in actions brought against them. I think, therefore, there is a sort of presumption against the Railway Commissioners having jurisdiction in this matter; since it is quite certain that if there have been overcharges the moneys paid in excess can be recovered back by the person overcharged by the company.

Now, having made those preliminary remarks, I will call attention to the words used in the Act of Parliament:—"Every railway company" "shall, according to their respective powers, afford all reasonable facilities," for what? "For the receiving and forwarding, and delivering of traffic." I think that the natural meaning of those words is such that they have no reference to the question of price at all. The words are affirmative: "they shall afford all reasonable facilities," but I confess I am inclined to think they must be interpreted also negatively, and must mean that the company shall not put any unreasonable impediment in the way of "receiving and forwarding and delivering of traffic." The section says:—"No such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." I am inclined to think, therefore, that those words put negatively the same idea as is conveyed in the words affirmatively, "for the receiving and forwarding, and delivering of traffic," and I confess I do not think that they have anything to do with the price the company have to charge.

Now the Attorney General put a case which at first seemed to help him in his contention very much. He said, suppose the company were to be willing to carry a man or his goods, but at such a price that in all human probability the man would not have the money in his pocket or be minded to part with it, subject to the right of getting it back. If that were done it would, to use the Attorney General's similitude, be as if the company had put a barrier in the way of such person being carried as a passenger, or of his goods being carried as merchandise, and would, I should say, be a proceeding calculated to put an impediment in the way of receiving, forwarding, and delivering traffic. But that case is not surmised against these defendants, and I cannot help saying that the matter here seems to be so plain that there is some difficulty in giving any other reason for deciding against the appeal than reading the very words of the enactment "the company shall afford all reasonable facilities for receiving, and forwarding, and delivering traffic."

Then as to the cases. With respect to *Chatterley Iron Company* v. *North Staffordshire Ry. Co.* (1), I pass it sub silentio. But as to *Aberdeen Commercial Company* v. *Great North of Scotland Ry. Co.* (2) I entirely concur with it, and I take the liberty of saying I think it was quite rightly decided. What really happened there was this. The railway company there issued a notice, saying, " Notice is hereby given that the Great North of Scotland Railway Company do not profess to act, and do not act as carriers of the undermentioned articles, namely," and then they set forth articles of manure and articles of a like nature, and I suppose they relied on their right to say they would be common carriers of certain goods, and not of other goods; but then comes in this special jurisdiction of the Railway Commissioners, and they have a right to say that reasonable facilities shall be given for receiving and forwarding traffic, and therefore to say to the company, you shall carry these articles which you said you would not carry. Now, if the notice of the railway company had stopped there, I think it would be clear for the reason I have given that the Railway Commissioners would have authority to say, "You shall give facilities for that traffic." If that is so, that is not affected by what follows in the notice, viz., "The company, however, at the request of parties, and upon certain conditions, and at agreed rates (but not otherwise) will provide waggons or locomotive power, or both, to persons desiring the use of the railways owned, worked, or used by the company for the purpose of allowing them to forward any of the above-named articles, from or to any of the stations, and on the harbour rails at Aberdeen." Well, a man has a right to object to that, viz., to object to having to make an agreement on conditions, or agreed rates, or otherwise; and therefore the applicants there called upon the Railway Commissioners to give facilities for the carriage of that traffic, and what I think in effect the Railway Commissioners ordered, and the Court of Session in Scotland in substance held, was that such facilities should be given. It is true the Railway Commissioners raised questions about rates, and the learned judges at the Court of Session talked about rates, but to my mind that was incidental only to their decision, which was that the railway company should carry manure under the provisions of the Act of Parliament which constituted them. I think, therefore, that that judgment is in no way inconsistent with what seems to me to be the obvious meaning of the first part of s. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31).

---

(1) 3 Nev. & Macn. 238.

(2) 3 Nev. & Macn. 205.

BRETT, L.J. I think that this complaint, assuming the facts stated in it and upon which it is founded to be true, does not raise a matter which the Railway Commissioners had any jurisdiction to entertain. The complaint is founded solely upon the allegation that there has been an overcharge, in the sense that the charge was higher than the amount which the company were entitled to exact. There is no statement that that overcharge was made with the intent to prevent the carriage of any passenger or the progress of any train, and there is no statement that that overcharge is of such an amount or of such a nature as would prevent the carriage of any passenger or forwarding of any train at all, and it is on account of the absence of either of those allegations that it seems to me that the Railway Commissioners had no jurisdiction to entertain the matter. If there were a statement in the complaint that the overcharge was done with the intent to stop the running of a train or prevent a certain number of trains going, as at present advised, I should think it was a matter within the jurisdiction of the Railway Commissioners, because such would prevent the carriage of passengers, and I am also inclined to think that if the statement of the complaint were that there was not simply an overcharge, but an overcharge so great that it did, in fact, prevent passengers going by trains, or did in fact prevent any train being put on the line which ought to be there, that that would give them jurisdiction and that it would be the duty of the Commissioners to entertain the application. It is, however, consistent with this complaint that precisely the same number of trains run and the same number of passengers are carried as if the alleged overcharge had never been made, and I think therefore that the Railway Commissioners had no jurisdiction to entertain this complaint.

COTTON, L.J. I am of the same opinion. The complaint is simply that the charges made by the railway company for a great many of their journeys are beyond those which their special Act of Parliament or the general Acts allow them to charge, and in that sense, and in that sense only, are excessive. Now, the only question we have to determine is whether this comes within the words of the second section of the Railway and Canal Traffic Act, 1854, on a reasonable interpretation of those words. They are that the company "shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic" upon their railway. Can this excessive charge be said to be a refusal of reasonable facilities. Now what I think comes within those words "afford all reasonable facilities," is the providing proper accommodation in the stations and in the carriages for the receiving and forwarding passengers, and for getting them in and out of their carriages and the like. The mere fact that the charge is beyond that which Parliament has sanctioned is not in my opinion a refusal to afford reasonable facilities. It may be the charges are so excessive as to be a refusal to afford reasonable facilities, but I think it better not to give any opinion on that point, though, as at present advised, if charges were made either as regards a particular train or as regards particular stations to such an amount as to be calculated to prevent the use of those trains, or the traffic to those stations, that would be a refusal to afford reasonable facilities for forwarding passengers by those trains; and the Railway Commissioners might have power to entertain the question of the quantum, if it was shewn either from the excess that it was calculated to have that effect, or that it was done for the purpose of having that result. But here there is nothing of the sort alleged, and the mere fact of the charge being beyond the parliamentary limits is not, in my opinion, a refusal of reasonable facilities within the meaning of the enactment. On the case of *Aberdeen Commercial Company* v. *Great North of Scotland Ry. Co.* (1) I wish to say one word. Of course we are not bound by that decision, but one would regard with great respect any opinion expressed by judges in the Court of Session in Scotland. But there was in that case a preference of one particular description of traffic over another, because the company acted as common carriers in respect of goods generally, but as regards a particular kind of goods they said they would not act as common carriers, and would only carry it on a particular contract. There the decision was that the company were really affording a preference in favour of traffic other than manure to the disadvantage of this particular description of traffic, and that I think was the real ground of the decision in that case.

Appeal dismissed, and order for prohibition affirmed.

Solicitor for Railway Commissioners: *Solicitor to the Treasury; Hare & Fell, agents.*

Solicitor for Great Western Railway: *R. R. Nelson.*

(1) 3 Nev. & Macn. 205.

W. P.

1881
May 18.

REG. *v.* DUNCAN.

Criminal Law—Practice—Indictment for Obstruction of Highway—Acquittal—New Trial.

Upon the trial of an indictment for obstructing a highway the defendant was acquitted:—

Held, that a new trial on the ground of misreception of evidence, misdirection, and that the verdict was against evidence, could not be granted.

An indictment for obstruction of a highway, found at quarter sessions, was removed by certiorari into the Queen's Bench Division, and tried at Winchester Assizes in January last before Baggallay, L.J., and a special jury. The defendant was acquitted.

A rule having been granted calling on him to shew cause why the verdict for him should not be set aside and a new trial had on the grounds, 1, improper reception of evidence; 2, misdirection; 3, that the verdict was against the weight of evidence,

A. Charles, Q.C. (*Bullen*, with him), shewed cause. This is a criminal case. The defendant has, by the indictment, been put in peril of imprisonment, and has been tried and acquitted; no new trial can therefore be allowed on any of the grounds in the rule. That the Court will not grant a new trial in such case on the ground of a verdict being against the weight of evidence is established by *Reg.* v. *Johnson.* (1) On indictments for non-repair of a highway new trials have indeed been granted. But a distinction has been drawn between an indictment for non-repair, which is practically a civil proceeding, and an indictment for obstruction of a highway for which the defendant may be sent to gaol: *Reg.* v. *Russell.* (2) [He was stopped.]

Collins, Q.C., and *Warry*, in support of the rule. The Court has power to grant a new trial under certain circumstances in such cases. Technically all highway indictments are criminal proceedings. In *Rex* v. *West Riding of Yorkshire* (3) the inhabitants were indicted for non repair of a bridge and were acquitted, but a new trial was granted. In *Reg.* v. *Chorley* (1) the defendant was indicted for obstructing a public footway, and after verdict for the defendants a new trial was moved for on the ground of misdirection and improper reception of evidence, and although the rule nisi was on the suggestion of Lord Denman, C.J., drawn up to stay judgment until the further order of the Court, in order that a fresh indictment might be preferred, the rule as made absolute was for a new trial. After a verdict of not guilty on a presentment at a Court of Sewers for non-repair of a sea-wall, a new trial was granted on the grounds of misdirection and rejection of evidence: *Reg.* v. *Leigh.* (2)

---

(1) 2 E. & E. 613.

(2) 3 E. & B. 942.

(3) 2 East, 353.

In *Reg.* v. *Johnson* (3), although the Court no doubt held that a new trial would not be granted on the ground that the verdict was against evidence, it was assumed that a new trial might be granted for misdirection.

[PER CURIAM. Has a new trial ever been granted after acquittal on a criminal charge?]

Charles, Q.C. No new trial can be granted either after conviction or acquittal. In *Reg.* v. *Scaife* (4) a new trial was granted after conviction on the ground of improper reception of evidence and misdirection; but that case was examined and not followed in *Reg.* v. *Bertrand.* (5)]

LORD COLERIDGE, C.J. It is plain that we cannot interfere. What may have been the constitutional or legal principles on which the practice was founded it is much too late to inquire. The practice of the Courts has been settled for centuries, and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted. The one case in which a new trial was granted in a purely criminal case, on the ground of misdirection or misreception of evidence, *Reg.* v. *Scaife* (4), was a case not of misdemeanour but of felony. At that time there was an important distinction between misdemeanours and felonies. The importance of it has since been

---

(1) 12 Q. B. 515.

(2) 10 A. & E. 398.

(3) 2 E. & E. 613.

(4) 17 Q. B. 238.

(5) Law Rep. 1 P. C. 520.

1881

THE QUEEN
v.
DUNCAN.

destroyed by the legislature, the distinction as regards the effect of a conviction upon the family and property of the felon having been abolished. *Reg.* v. *Scaife* (1) stands unreversed, and if it had been followed it would have worked a revolution in criminal practice. But that case took no root in our jurisprudence and has never been followed. It was explained in the Judicial Committee in *Reg.* v. *Bertrand* (2) by Sir John T. Coleridge shewing that the point had not been presented to the Court of Queen's Bench, and he and Sir William Erle, sitting in the Privy Council, evidently felt that *Reg.* v. *Scaife* (1) was a case which could not be supported, and they declined to follow it. So it has never been followed in these courts, and has been distinctly disapproved in a case decided by a Court of very high authority, viz. the Privy Council in which two of the judges, Sir John T. Coleridge and Sir William Erle, were two of those who decided *Reg.* v. *Scaife.* (1) The case, therefore, stands absolutely bare of authority. We are asked for the first time to grant a new trial after an acquittal on an indictment placing the defendant in peril of imprisonment. If the legislature thinks fit to declare that new trials shall be granted after acquittals for felonies, misdemeanours, or both, it may of course do so. But we sitting here cannot but follow a clearly ascertained line of practice. As the Court said in *Reg.* v. *Bertrand* (2), "What long usage has gradually established, however first introduced, becomes law; and no court, nor any more this committee, has jurisdiction to alter it; but on the same principle, neither the one nor the other can in the first instance make that to be law which neither the legislature nor usage has made to be so, however reasonable, or expedient, or just, or in analogy with the existing law it may seem to be."

FIELD, J. We are bound by a rule of practice laid down for the administration of justice in these courts. Our duty is clearly not to act on our own particular judgments but to subordinate them to the general convenience of principles established by so long a course of authority. Of course I should be glad if the expenses of a fresh indictment could have been avoided, but it would be very dangerous to deviate from the settled practice. We could not do so without admitting new trials in a great number of criminal cases. We must abide by the law as it stands, and leave the legislature to alter it.

---

(1) 17 Q. B. 238.

(2) Law Rep. 1 P. C. 520.

BOWEN, J. I am of the same opinion.

Rule discharged.

Solicitors for prosecution: *Knight & Ward.*
Solicitors for defendant: *Swann & Co.*

J. R.

DRAKE, APPELLANT; FOOTITT, RESPONDENT.
DRAKE, APPELLANT; HANKIN, RESPONDENT.

March 24.

Riot—Action against Hundred—Damage to Houses—Larceny therefrom by Rioters—Felonious Demolition—Intention to destroy—Evidence—Compensation from Hundred—7 & 8 Geo. 4, *c.* 31, *s.* 2; 24 *&* 25 *Vict. c.* 97, *ss.* 11, 12.

A house damaged by rioters is not "feloniously demolished wholly or in part" so as to entitle the person damnified to compensation from the Hundred under 7 & 8 Geo. 4, c. 31, s. 2, unless the rioters when attacking the house had an intention wholly to destroy it.

During an election riot, and before the Riot Act was read, the rioters attacked many houses, broke the windows and damaged the walls by throwing stones, and stole tobacco from a house so damaged:—

Held, that there was no evidence of felonious demolition for which the Hundred was liable to compensate the persons damnified.

CASES stated by justices for Buckinghamshire under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, s. 33.

The respondent Footitt having a residence and shop in Great Marlow, gave due notice under 7 & 8 Geo. 4, c. 31, ss. 8, 32, and 32 & 33 Vict. c. 47, s. 5, to the appellant, the chief constable of the county, claiming compensation from the inhabitants of the hundred of Desborough, in which Great Marlow is situate, for damage which the respondent alleged that he had sustained to the amount of 16*l.* by persons riotously and tumultuously assembled together at Great Marlow on the 2nd of April, 1880. The statutory provisions as to procedure were complied with, and a special petty sessions was convened, at which the justices heard evidence on oath of witnesses, found that the respondent had sustained damage by means of an offence within 7 & 8 Geo. 4,

c. 31, to the amount of 16*l*., and adjudged that such sum should be paid to him for the damage with costs.

The respondent Hankin having sustained like damage on the same occasion also claimed and was awarded compensation by an order of the justices.

On the hearing it appeared that on the 2nd of April, 1880, a poll was taken for the election of a member for the parliamentary borough of Great Marlow, and that the declaration of such poll took place about 6 o'clock P.M. Colonel Williams was duly elected.

The headquarters of Colonel Williams were at the Crown Hotel, which faces the High Street of Great Marlow.

Shortly after 6 P.M. a crowd collected in front of the hotel in which Colonel Williams then was, and began breaking the windows of the hotel.

They broke all the windows in front of the hotel, and several of the frames, with stones and brickbats, which were used freely. A ladder, which happened to be resting against the front of the hotel, was driven by the mob through the windows with such force that it damaged the inside wall of one of the rooms made of lath and plaster there, the front rooms of the hotel were made a wreck.

The mob charged the gates of the hotel, which were shut with difficulty, and barricaded. The police outside, in number about twenty-six, seemed unable to stop the rioting, and several special constables were sworn in.

Some of the mob said they would burn down the hotel, and that the town should be worse than Sodom and Gomorrah.

The mob tore down a lamp fixed into the wall of the house of the respondent Footitt, situate about twenty yards from the Crown Hotel, and with stones broke the windows of such house and injured the slates and masonry of his house and the iron shutters thereof.

[After describing the like damage to other houses, the case stated further.]

Above ninety houses in the town were similarly attacked and in part destroyed, and the work of destruction continued without intermission until the rioters were charged when attacking the house of Mr. Hammond Chambers, who himself detected a rioter in the act of heaving a paving stone at his door, when he came up with the police.

About 9 P.M. on the same evening the Riot Act was read by a county magistrate, and special constables were sworn in who with a force of county police, about thirty minutes after the Act had been read, charged and dispersed the rioters, when attacking the house of Mr. Hammond Chambers. Some of the police were injured and taken away insensible.

After the commencement of the riot, and prior to the reading of the Riot Act, the house of the respondent Hankin, situate in High Street, Great Marlow, aforesaid, in which he then carried on the business of a tobacconist was attacked by the mob, and five of the windows thereof were broken by stones thrown by the mob, and one of the inner walls was damaged by one of such stones, which passed through one of the windows. The mob were riotously and tumultuously assembled together. The mob on the said occasion stole from the windows of the shop of the respondent Hankin goods of the value of *2l.* One of the mob said, whilst the said house was being attacked, "All I want is the tobacco and cigars."

It was contended on the above evidence on the part of the appellant, before the justices at the hearing, that the houses of the respondents had not been feloniously demolished, pulled down, or destroyed, wholly or in part, within the meaning of 7 & 8 Geo. 4, c. 31, s. 2. The justices, however, taking into consideration the facts and circumstances as stated above, of the riot, were of opinion that the houses of the respondents had been feloniously demolished, pulled down, or destroyed in part, by the persons riotously and tumultuously assembled together; and the justices accordingly made the orders before-mentioned on the treasurer of the county.

The questions for the opinion of the Court therefore were: Whether the houses of the respondents were feloniously demolished, pulled down, or destroyed, wholly or in part, within the meaning of 7 & 8 Geo. 4, c. 31, s. 2? and whether the said orders were properly made? (1)

---

(1) Both cases were argued together.

[The evidence was made part of the case.]

March 21. *Bulwer, Q.C.* (*Bullock*, with him), for the appellant. The justices ask, in effect, whether there was any evidence to support their finding. By 7 & 8 Geo. 4, c. 31, s. 2, if any house shall be "feloniously demolished, pulled down, or destroyed wholly or in part," by any persons riotously and tumultuously assembled together, the inhabitants of the hundred shall be liable to yield full compensation to the person damnified by the offence. Sect. 8 prescribes the mode of proceeding when the damage does not exceed 30*l.* But "it is not every breaking of the windows or doors of a house which will make the hundred answerable. The acts of the mob must indicate a purpose to demolish the house:" per Lord Ellenborough, in *Rex* v. *Chambers.* (1) The riot must be of such a kind as to amount to a felony: *Reid* v. *Clarke.* (2) Even if the rioters are interrupted, the question is, what was their ultimate intention? *Reg.* v. *Adams.* (3) It is not "beginning to demolish" a house within the meaning of the Act unless the ultimate object of the rioters was to demolish the house: *Rex* v. *Thomas* (4); *Rex* v. *Price* (5); *Reg.* v. *Howell.* (6) Whether the act is or is not felonious depends on the intention to wholly demolish the house.

[LINDLEY, J. Is there no definition of "feloniously" in this or the older statute?]

No; but by 24 & 25 Vict. c. 97, the Malicious Injuries to Property Act, s. 11, if any persons riotously and tumultuously assembled . . . shall unlawfully and with force demolish, or begin to demolish, any house, every such offender shall be guilty of felony. But to entitle the person damnified to compensation from the hundred there must still be a felonious intention to totally demolish the house. The intention of the rioters must be inferred from their acts. They appear to have gone from house to house doing damage, and to have attacked above ninety houses in the town, but there is no evidence to shew that they intended to demolish the house of either respondent rather than any one of the other houses; and in Hankin's case an intention to the contrary was even expressed, that the object of the mob was not to demolish the house, but to get the tobacco in it.

---

(1) 4 Camp. 377, at p. 378.

(2) 7 T. R. 496.

(3) 1 Car. & M. 299.

(4) 4 Car. & P. 237.

(5) 5 Car. & P. 510.

(6) 9 Car. & P. 437.

W. Graham (*Chambers*, with him), for the respondents. The questions put to the Court are questions of fact. The Court can only deal with points of law. The Riot Act, 1 Geo. 1, stat. 2, c. 5, s. 4, made it a felony in rioters to demolish, or begin to demolish, a house. Sect. 6 gave the person injured a right to compensation from the hundred; and in *Reid* v. *Clarke* (1) the Court held, on that Act, that if there was no felony within the Act, the hundred was not liable. There the pulling down was before the Riot Act had been read. Those sections, 4 and 6, were repealed by the general repealing statute, 7 & 8 Geo. 4, c. 27, and by 7 & 8 Geo. 4, c. 31, s. 2, it was enacted that if any house should be "feloniously demolished," . . . wholly or in part, by rioters, the hundred should be liable to make compensation. On that s. 2 the present proceedings were taken. The question is, whether the rioters here had a felonious intention. That is a question of fact. In all the cases cited it was left to the jury. Can the Court say, as a matter of law, that there was no evidence of such intention? In the case of Footitt there was at least evidence both ways. In the case of Hankin there was evidence of house-breaking and stealing, so there was clearly a felonious demolition quite apart from the Riot Act.

Bulwer, Q.C., in reply. The argument for the respondents would, if sound, make the hundred liable whenever rioters broke a window and stole something out of it. But the *demolition* must be felonious, and cannot be so unless the rioters had the intention to wholly demolish the house. Punishment of the rioters is one thing, the liability of the hundred for their acts is another. The mere fact of larceny from the broken shop window cannot render the demolition felonious within the terms of the statute and decisions. In the cases cited the question was left to the jury, because in criminal trials the judge always takes their verdict, even though he directs an acquittal. So here the Court may direct the justices that there was no evidence, and that they ought not to find the hundred liable.

Cur. adv. vult.

(1) 7 T. R. 496.

March 24. LINDLEY, J. These two cases raise an important question with respect to liability of the hundred to make good the damage sustained by Mr. Footitt and Mr. Hankin respectively, in consequence of their houses having been more or less demolished or injured or wrecked in an election riot. The injuries done to the houses of these gentlemen were considerable. In Mr. Footitt's case there was no felony committed, unless the destruction of his house amounted to a felony. In Mr. Hankin's case some of his tobacco was stolen after his house was more or less broken into or destroyed. That is the distinguishing feature between the two cases, and we have to consider whether the hundred is liable for the damage so done. The destruction in both cases was before the Riot Act was read. The destruction began at six o'clock in the evening; these acts of violence were committed between six and nine. At nine the Riot Act was read.

By 7 & 8 Geo. 4, c. 30, s. 8, "If any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy any house," every such offender shall be guilty of felony. That is a section to bear in mind when considering the provision which throws the damage upon the hundred, viz., 7 & 8 Geo. 4. c. 31, s. 2, enacting that if "Any house . . . shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred . . . shall be liable to make a compensation." Under that section the proceedings before the magistrates were taken, and we have to consider the true construction of the words, "if any house shall be feloniously demolished, pulled down, or destroyed." It is stated, and it is beyond controversy in this case, that there were persons riotously and tumultously assembled together. Then what is the meaning of the expression "feloniously demolish, pull down, or destroy?" For the purpose of determining the true construction of that section regard must be had to the history of the Acts of this character, beginning with the Riot Act, 1 Geo. 1, stat. 2, c. 5, which contains three sections of importance, the 1st, the 4th, and the 6th. Sect. 1 made it a felony if persons, to the number of twelve or more, were riotously assembled and refused to disperse for an hour after the reading of the Riot Act. Sect. 4 made it a felony for persons tumultuously assembled to demolish or pull down a house. Sect. 6 made the hundred liable for injury done to houses which were so demolished or destroyed. It was decided under that Act that there was no liability on the part of the hundred to make good damage done to houses unless the houses were feloniously demolished or destroyed, or commenced to be feloniously demolished under s. 4: *Reid* v. *Clarke.* (1) Then it was decided further that there was no destruction or demolition, which amounted to a felony within the Riot Act, unless there was a total destruction or the beginning of a total destruction, that is to say unless there was some intent or purpose to destroy the house, and the cases decided that if the mob attacked the house for the purpose of maliciously injuring it—not destroying it and with no purpose to destroy, but—breaking the windows and smashing the doors, that alone was not only no destruction and no commencement of destruction, but it was not an offence within the Act at all, unless there was something more to shew that they intended to destroy, and if they left the house when they might have destroyed it, but did not, without being prevented by the police or otherwise, the case was held not to come within s. 4, that is to say, it was held there was no felonious attack upon the house. But if on the other hand they were proceeding to demolish it, and the evidence would have warranted the inference that they would have demolished it if not prevented, it was a commencement to demolish or destroy. The 7 & 8 Geo. 4, c. 27, repealed both the 4th and 6th sections of the Riot Act, that is to say it repealed the section which made the demolition of the house felonious, and it repealed the section which threw upon the hundred the liability to compensate persons who were injured by that which amounted to a felonious demolition or destruction under s. 4. 7 & 8 Geo. 4, c. 30, s. 8, re-enacted in substance s. 4 of the Riot Act. I read s. 8 just now. So that there was a provision, namely, 7 & 8 Geo. 4, c. 30, s. 8, which made the destruction of the house or the demolition of the house, under the circumstances mentioned in that statute, felonious. There was also—and it is important to bear it in mind—another section, s. 24, in the same Act, which related to malicious injuries to property or houses as distinguished from felonious destruction or demolition. Then came 7 & 8 Geo. 4, c. 31, s. 2, which re-enacted in substance the repealed s. 6 of the Riot Act. In that state of the law there was a series of important decisions which all seem to me to establish the same point or to illustrate it: *Rex* v. *Thomas* (1); *Rex* v. *Price* (2); *Rex* v. *Batt* (3); *Rex* v. *Howell* (4); and *Rex* v. *Adams* (5), decided on s. 8 of 7 & 8 Geo. 4, c. 30, not the section under which the hundred is liable, but the section which makes destruction of a house felonious in certain events. Now the construction put upon 7 & 8 Geo. 4, c. 30, s. 8, in all these cases is the same as that put upon s. 4 of the Riot Act, and comes to this, that there is no felony committed under 7 & 8 Geo. 4, c. 30, s. 8, unless there was demolition or destruction or the commencement of a demolition or destruction, the purpose being to effect a complete demolition and destruction if there was no interruption.

---

(1) 7 T. R. 497.

That being the case, we pass on now to the statutes which were in force when this particular riot took place. Those are 24 & 25 Vict. c. 97, s. 11 (which has in substance replaced 7 & 8 Geo. 4, c. 30, s. 8, and relates to the felonious demolition or destruction of houses), and 24 & 25 Vict. c. 97, s. 12, which relates to malicious injuries and damage to houses. If there is a demolition or destruction or the commencement of a demolition or destruction such as is mentioned in s. 11, it is felonious by the Act. If it is short of that, if it is injury, or damage—no demolition or destruction or any intent or purpose to demolish or destroy—the offence is a misdemeanor under s. 12, but not a felony under s. 11.

Considered thus, the difficulty seems to vanish. We now have to apply that state of law to 7 & 8 Geo. 4, c. 31, s. 2, which throws upon the hundred the liability to make compensation "if any house shall be feloniously demolished, pulled down, or destroyed wholly or in part."

I cannot do better than read these words, by the light of the

(1) 4 C. & P. 237.

(2) 5 C. & P. 510.

(3) 6 C. & P. 329.

(4) 9 C. & P. 437.

(5) 1 Car. & Mar. 299.

history of the legislation and the light of the construction which has been put upon similar enactments in similar cases, and it seems to me in neither of the cases before us was there any demolition or commencement of demolition, pulling down, or destruction, wholly or in part, which is felonious within the meaning of the 2nd section of 7 & 8 Geo. 4, c. 31.

In *Footitt's* case there was really nothing but the injury to the house; that there was a misdemeanor in the sense of malicious injury within 24 & 25 Vict. c. 97, s. 12, is plain enough, but that is not a felonious demolition or destruction in whole or in part within the meaning of those words.

In *Hankin's* case the conclusion is the same, notwithstanding the felony—notwithstanding that after the place was broken open, there being no intent to destroy the house, some of the mob stole some tobacco, for that does not make the demolition of the house demolition or destruction in whole or in part within 7 & 8 Geo. 4, c. 31, s. 2. It appears to me, therefore, that the justices took an erroneous view, and that there was no evidence to go to a jury of there being a felonious destruction in whole or in part. The magistrates have stated the facts, and they drew the inference that there was such a destruction as was felonious, and they therefore made orders upon the hundred. I am of opinion that the orders were erroneous, and that judgment must be for the appellant in each case.

MATHEW, J. I agree.

Judgment for the appellant.

Solicitors for appellant: *King & McMillin, for Baynes, of Aylesbury.*

Solicitor for respondents: *John Rawson, of Great Marlow.*

J. R.

1881
May 30.

THE ALRESFORD RURAL SANITARY AUTHORITY, Appellants; SCOTT, Respondent.

Highway—Repair—Gathering Stones upon inclosed Land—Right to Compensation—5 & 6 *Wm.* 4, *c.* 50, *s.* 51.

Under the Highway Act, 5 & 6 Wm. 4, c. 50, s. 51, justices are entitled to grant the surveyor of highways a licence to gather stones upon inclosed land within the parish for the repair of its highways, without making any compensation to the owner for the value of such stones.

Case stated by justices for Southampton under 20 & 21 Vict. c. 43.

The respondent, A. J. Scott, C. Curtis, and W. Patrick, appeared before the justices on a notice addressed to them, namely, to Scott as owner of certain land and premises, to Curtis as his agent, and to Patrick as the occupier of the land and premises, and whereby the guardians of Alresford Union, acting as the rural sanitary authority of Alresford, Southampton, required them to appear before the justices to shew cause why stones for repairing and amending the highways in the parish of Ropley should not be gathered, taken, and carried away out of and from the said land and premises situated in Ropley, according to the Highway Act, 1835.

At the hearing it appeared that the appellants, exercising the powers of a highway board within the highway district under ss. 4 and 5 of the Highways and Locomotives Amendment Act, 1878, had, by their surveyor, applied to Scott, as owner of the pieces of land, for leave to gather stones lying upon the land for the purpose of repairing the highways in the parish, and to take and carry away so much of the same as in the discretion of the surveyor should be thought necessary to be applied in the amendment of the highways, and that Scott had refused his consent unless satisfaction were made to him for the stones, and that he, Curtis, and Patrick, had been summoned to shew cause why such stones should not be gathered as in the notice specified.

It was contended on behalf of the appellants that the justices had power under s. 51 of the Highway Act, 1835 (1), to grant, if they should think proper, a licence to the appellants to gather,

---

(1) 5 & 6 Wm. 4, c. 50, s. 51: "It shall be lawful for every surveyor of highways, in any waste land or common ground, river or brook, within the parish for which he shall be surveyor, or within any other parish wherein gravel, sand, stone, or other materials are respectively likely to be found (in case sufficient cannot be conveniently had within the parish where the same are to be employed, and sufficient shall be left for the use of the roads in such other parish) to search for, dig, get, and carry away the same, so that the surveyor doth not thereby divert or interrupt the course of such river or brook, &c., and likewise to gather stones lying upon any lands or grounds within the parish where such highway shall be, for such service and purpose, and to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways without making any satisfaction for the said materials, but satisfaction shall be made for all damages done to the lands or grounds of any person or persons by carrying away the same in the manner hereinafter directed for getting and carrying materials in inclosed lands or grounds, but no such stones shall be gathered without the consent of the owner of such lands or grounds, or a licence for the purpose from two justices at a special sessions for the highways, after having summoned such owner to come before him and heard his reasons, if he shall appear and give any, for refusing his consent."

By s. 53: "It shall not be lawful for any surveyor, or any other person acting under the authority of this Act, to dig, gather, get, take, or carry away any materials for making or repairing any highway out of or from any inclosed land or ground until one calendar month's notice in writing, signed by the surveyor, shall have been given to the owner of the premises from which such materials are intended to be taken, or to his known agent, and to the occupier of the premises from which such materials are intended to be taken, or left at the house or last or usual place of abode of such owner or agent, and also of such occupier, to appear before the justices at a special sessions for the highways, to shew cause why such materials shall not be had therefrom, and in case such owner, agent, or occupier shall attend pursuant to such notice, but shall not shew sufficient cause to the contrary, such justices shall, if they think proper, authorize such surveyor or other person to dig, get, gather, take, and carry away such materials at such time or times as to such justices shall seem proper, and if such owner, agent, or occupier shall neglect or refuse to appear by himself or his agent, the said justices shall and may (upon proof on oath of the service of such notice) make such order therein as they shall think fit as fully and effectually to all intents and purposes as if such owner or occupier, or his agent, had attended."

Sect. 54: "It shall be lawful for every such surveyor, for the use aforesaid by licence in writing from the justices at a special sessions for the highways, to search for, dig and get materials, if sufficient cannot be had conveniently within such waste lands, common grounds, rivers or brooks, in or through any of the several or inclosed lands or grounds of any person whomsoever (such lands or grounds take, and carry away stones from the lands of Scott for the purpose before mentioned without making any satisfaction for the stones, but making satisfaction for the damage, if any, done to the lands by carrying away such stones, such satisfaction, if any, to be made in manner provided in s. 54 of the same Act for getting and carrying away materials in inclosed lands.

The justices being of opinion that the lands being inclosed lands they had no power to grant a licence to the appellants to gather such stones, without making satisfaction to Scott for them as well as for damage, if any, done to the lands by carrying them away, dismissed the application.

The question for the opinion of the Court was whether their determination was correct.

Leach, for the appellants. The question whether stones can be gathered from the respondent's land for the use of the highways without making him compensation turns upon s. 51 of the Highway Act. It will be contended by the respondent that the effect of s. 54 is to narrow the operation of the latter half of s. 51 with regard to the power to gather stones from inclosed land without making satisfaction, and that compensation must be made for all materials taken from inclosed land. But s. 54 does not apply to the right to gather stones without breaking the surface of the soil as given by s. 51. The word "gather" does not occur in s. 54. Sect. 54 applies only to digging and getting materials, and

---

not being a garden, yard, avenue to a house, lawn, park, paddock, or inclosed plantation, or inclosed wood, not exceeding 100 acres in extent) within the parish where the same shall be wanted, or within any other parish adjoining or lying near to the highway for which such materials shall be required, if it shall appear to such justices that sufficient materials cannot be conveniently had in the parish where such highways lie, or in the waste lands or common grounds, rivers or brooks of such adjacent parish, and that a sufficient quantity of materials will be left for the use of the parish where the same shall be, and to take and carry away so much of the said materials as by the discretion of the surveyor shall be thought necessary to be employed in the amendment of the said highways, the said surveyors making such satisfaction for the materials which may be got or taken away, and also for the damage done to such lands or grounds by the getting and carrying away the same, as shall be settled and ascertained by order of the justices at a special session for the highways."

it is referred to by s. 51 merely for the purpose of shewing the manner in which compensation is to be ascertained.

Greenwood, for the respondent. The meaning which the justices put upon the Act of Parliament was the right one. The general words "any lands or grounds," which are used in s. 51, where the power to gather stones is given, are modified by ss. 53, 54, and the nature of the power is explained in those sections. Sect. 51 is copied from s. 27 of the repealed Act, 13 Geo. 3, c. 78, and s. 53 is taken from the Turnpike Act, 3 Geo. 4, c. 126, s. 98, which gives compensation for gathering stones. The repealed Act, 13 Geo. 3, c. 78, allowed the surveyors to gather stones and to dig materials upon inclosed lands without a licence from the justices and without making the owner any compensation whatever. The present Act was intended to remove this injustice. The compensation clause in the latter part of s. 54 must be taken to apply equally to gathering stones and selling or taking away materials from inclosed lands.

HUDDLESTON, B. Some little ambiguity is caused by the arrangement and wording of the sections of the Highway Act which have been brought before us, but I think the case is tolerably clear. The legislature contemplated two classes of cases—one where compensation is to be made, and another where it is not to be made, for materials taken for the repair of highways. Where materials are taken from waste lands, commons, rivers or brooks, and where stones are gathered upon any land there is to be no compensation, though payment is to be made for damage done to the lands of any person by carrying away the stones. This is the effect of s. 51. There is a restriction in s. 52 with regard to the sea beach, and we come to s. 53 which refers to the notices to be given before materials can be gathered or stones dug from any inclosed lands, so as to enable justices to consider what inconvenience may be caused by the exercise of the statutory powers. Then comes s. 54, which applies to digging or getting materials upon inclosed lands or lands in an adjoining parish, and here it is provided that the surveyor shall make compensation. But there is a proviso which ought to have stood by itself as a special clause, and which, of course, applies to s. 51—that no stones shall be got, carried, or dug in any garden, avenue, lawn, park, &c. The policy of the Act seems to be that stones may be gathered upon public lands—commons or waste lands—for the repair of the parish roads, and that they may be gathered from any lands in the parish whether inclosed or not, making no satisfaction for these stones, but paying for any injury that is done. Even then the surveyor cannot proceed without giving notice to the owner and having the matter adjudicated upon by the justices. Then there are more stringent provisions with respect to other materials to be dug up or got from inclosed lands either within or without the parish. But, inasmuch as the materials here are simply to be gathered and not dug up or got, they may be taken away without satisfaction for their value, but only for the injury done in removing them. I think the justices ought to have made the order, and that this appeal must be allowed.

HAWKINS, J. I am of the same opinion. The question is whether the justices had power to grant the licence without making satisfaction to Mr. Scott. I think they had the power—whether they are bound to grant the licence is another question altogether. The extent of their power depends upon the construction to be put upon ss. 51, 53 and 54 of the Highway Act. [The learned judge read the sections.] The effect of these sections is that the surveyor may dig and search for materials upon wastes and commons in the parish in which the highway is. But it may happen that after searching on these places it becomes necessary to go elsewhere, and in that case the justices are empowered to grant a licence authorizing the digging and carrying away of materials from other lands in the parish whether they are inclosed or not, provided that they are not lands of a strictly private nature, such as gardens, lawns, parks, &c. It is then enacted that satisfaction must be made for the materials so dug and carried away, not only for their value, but also for the damage done to the land from which they are taken. I now proceed to what is applicable to the present case—that is, the gathering of stones. By s. 51 power is given to the surveyor to gather stones "lying upon any lands or grounds within the parish where such highway shall be without making any satisfaction for the materials, but making satisfaction for the damage done by carrying away the same in manner hereinafter directed for getting or carrying materials on inclosed lands or grounds." Then comes s. 53, which contains provisions with regard to inclosed lands. Taking these sections together it seems that it is a condition precedent to the power to gather stones that the owner shall have a month's notice of the intention to apply to justices for a licence to gather them, and at the expiration of the month the licence must be applied for and obtained. The owner or occupier of the land may appear before justices and shew cause why the order should not be made, and I can conceive many cases in which the justices, though thinking that the highway wanted repair, and that stones were lying on the surface of agricultural land, might decline to make the order on the ground that the stones were of considerable value, and that to remove them would depreciate the value of the land. And, although the justices cannot order compensation for the value of the stones they have large powers as to regulating the quantity of stones to be taken from each piece of land and the times at which they are to be taken. They cannot order compensation as the price of the stones, but they can order compensation for the injury done to the land by removing them, to be assessed in the manner indicated in s. 54.

Judgment for the appellants. [*Leave to appeal refused.*]

Solicitors for appellants: *Prior, Bigg, Church & Adams.*
Solicitor for respondent: *Parkers.*

A. P. S.

1881
June 22.

LAWRENCE *v.* THE ACCIDENTAL INSURANCE COMPANY (LIMITED).

Insurance (Life)—Insurance against Accident—"Sole cause of Death"—Sudden Fit—Fall from Platform upon Railway—Construction of Policy.

A policy of insurance against death from accidental injury contained the following condition: "This policy insures payment only in case of injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, but it does not insure in case of death arising from fits . . . or any disease whatsoever arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury."

The insured, while at a railway station, was seized with a fit and fell forwards off the platform across the railway, when an engine and carriages which were passing went over his body and killed him:—

Held, that the death of the insured was caused by an accident within the meaning of the policy, and that the insurers were liable.

Special case.

On the 10th of February, 1873, James Lawrence effected with the defendants a policy of insurance for 1000*l.*

By the policy it was witnessed that the defendants thereby agreed that if at any time before the expiration of one year from its date, or if at any time thereafter during his life, while the insured should, at the expiration of each year from the date when the policy was renewable, pay the premiums as specified, the insured should receive any personal injury caused by accidental and external violence within the meaning of the policy and the conditions thereto, and the direct effect of the injuries should occasion his death within three calendar months from the happening thereof, then the funds and property of the company should be subject to pay the full sum thereby assured to his legal representatives, within three months after satisfactory proof of such death should be furnished to the directors of the company. The policy contained the following proviso: "Provided always that this policy insures payment only in case of injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocations, but it does not insure in case of death or disability arising from fits, or rheumatism, gout, hernia, erysipelas, or any disease whatsoever, arising before or at the time, or following such accidental injury [whether consequent upon such accidental injury or not, and whether causing such death or disability directly or jointly with such accidental injury]."

Subsequently to the effecting of the policy, and while it was still in force, namely on the 26th of February, 1879, the insured being at the Waterloo station of the South Western Railway, was taken suddenly ill and fell forwards (in a fit) off the platform across to and on to the railway there. A locomotive engine with empty carriages was at the moment passing through the station on the railway, and such engine and carriages passed over the neck and body of the insured, and he received mortal injuries, from which he instantly died. The falling forward of the insured off the platform was in consequence of his being seized with a fit or sudden illness, and but for such fit or illness he would not have suffered injury or death as before-mentioned.

The case then stated that the premiums had been duly paid, and the question for the opinion of the Court was whether the death of the insured was caused in such a manner as to entitle the plaintiff, as administratrix, to the payment of the sum assured by the policy.

Holl, Q.C. (*Pitt-Lewis*, with him), for the plaintiff. The case contains a distinct statement that the death of the assured was caused by the carriage passing over him. The fit in no way contributed to his death, except in this sense, that but for his being seized with it he would not have fallen across the railway. The policy is in substance the same as that in *Winspear* v. *Accident Insurance Co.* (1), where the proviso was that the insurance should not extend "to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease," and the assured being seized with a fit fell into a stream and was drowned. It was held that the company were liable, on the ground that the death was not caused by disease, but by the act of drowning. The same reasoning applies to the present case. The proviso against

---

(1) 6 Q. B. D. 42.

1881

LAWRENCE v. ACCIDENTAL INSURANCE CO.

death by disease, "whether causing such death or disability directly or jointly with such accidental injury," applies to cases where the disease is, jointly with the accident, the immediate cause of death, as where disease of the heart is accelerated by a shock to the system from accidental injury. Here the fit was no part of the immediate cause of death.

G. Bruce, for the defendants. The present policy insures not against sickness, but against accident only, and the Court will consider not what was the cause of death, but what was the cause of the accidental injury. Before the present policy takes effect there must be an actual injury by accident to the insured. It is true that in *Smith* v. *Accident Insurance Co.* (1) where the policy was in the same form as in this case, the company were held liable for death caused by erysipelas following an accidental cut received by the insured. In that case the disease supervened on the accident; here the accident actually arose from the disease. In *Fitton* v. *Accidental Death Insurance Co.* (2), there was a condition against death from hernia or any other disease or cause arising within the system of the insured before or at the time, or following such accidental injury, and it was held that the insurers were liable in a case where the insured died from hernia caused solely by external violence. In *Winspear* v. *Accident Insurance Co.* (3) the policy was in a different form. There was no mention of fits in the exception in the policy in that case. Here the accident must be the sole cause of death. The defendants have clearly expressed their intention to be liable in cases of pure accident, and not to be liable where an accident and disease concurrently bring about death.

Holl, Q.C., in reply. The real question is, what was the cause of the death of the insured? The fit was only one of a series of events which led to his falling upon the railway. In *Smith* v. *Accidental Death Insurance Co.* (1) the death was caused solely by erysipelas.

DENMAN, J. During the argument of this case I have had considerable doubt as to the meaning of the condition in the policy,

(1) Law Rep. 5 Ex. 302.

(2) 17 C. B. (N.S.) 122; 34 L. J. (C.P.) 28.

(3) 6 Q. B. D. 42.

1881

LAWRENCE
v.
ACCIDENTAL
INSURANCE CO.

and I am not sure that but for *Winspear* v. *Accident Insurance Co.* (1) I should not have thought that the company were protected. The facts are these: The deceased person while on a railway platform was suddenly seized with a fit, which caused him to fall forward off the platform on to and across the railway. A locomotive engine was at that moment passing through the station, it passed over his neck and body and he received mortal injuries of which he then and there died. Then it is stated in the case: "The falling forward of the insured off the platform as aforesaid was in consequence of his being seized with a fit or sudden illness, and but for such fit or illness he would not have suffered injury or death as before mentioned." Now the immediate cause of death is not in the least disputable, but there is no doubt that if he had not fallen there in consequence of the fit he would not have suffered death, and in that sense the fit led to his death. The question is whether that was merely one of several events which brought about the accident, in the sense that it caused the accident to happen by causing him to be there, or whether it was within the meaning of this proviso, a cause of death which would prevent the policy applying to the case. In *Winspear* v. *Accident Insurance Co.* (1) where a man while fording a river was seized with a fit, and so fell and was drowned in the river, a fit being undoubtedly a kind of disease which was not within the meaning of the policy, which was very like the present one, although not exactly identical, it was held that the death did not arise from disease within the exceptions in the policy. By this present policy, if the insured shall receive any personal injury caused by accidental and external violence within the meaning of this policy and the conditions thereto, and the direct effects of such injuries shall occasion his death within three calendar months from the happening thereof, then the funds of the company shall be subject to pay the sum assured. "Provided always that this policy insures payment only in case of injuries accidentally occurring from material and external cause operating upon the person of the insured where such accidental injury is the direct and sole cause of death to the insured or disability to follow his avocations, but it does not insure in case of death or disability arising from fits or rheumatism, gout, hernia, erysipelas, or any disease whatsoever arising before or at the time or following such accidental injury (whether consequent upon such accidental injury or not, and whether causing such death or disability directly or jointly with such accidental injury)." Now the words that appeared to me during a part of the argument to be strongly in favour of the defendants in this case are those latter words, "causing such death or disability directly or jointly with such accidental injury." If the words had simply been these, "this policy shall not attach in cases where the death is caused by an accident jointly with a fit," I should have thought it was a case in which in all probability the defendants would be entitled to our judgment. But these three last lines of the clause are merely lines in a parenthesis, and they are put in for the purpose of shewing that the exception will apply, whether the disease be consequent upon the accidental injury or not, or whether the disease be one that shall have caused the death itself directly, or whether it shall have caused the death jointly with the accidental injury. But then these are words merely defining the cases in which the previous words "arising from" may be applicable. The words "arising from" have already received judicial construction in the case of *Winspear* v. *Accident Insurance Co.* (1), in which it was held that the death did not arise from the disease. It appears to me that where words are merely put in as a variation of those previously used, and which are exactly the same as those that have received a judicial construction, we cannot put a different construction upon them.

---

(1) 6 Q. B. D. 42.

I think we are bound to hold that the death arose from the engine destroying the insured by coming across him, and not from the previous fact of a fit having attacked him and so brought him there. It is far better for us to decide in accordance with *Winspear* v. *Accident Insurance Co.* (1) on words that are really identical, so far as they operate in this case, than to gather a distinction out of words which are after all merely used as illustrations of the previous descriptions.

WATKIN WILLIAMS, J. I am clearly of opinion that the plaintiff is entitled to recover, and I desire to base my decision upon reason and principle, and not upon the decided cases. It seems to me perfectly clear and altogether free from doubt, that upon every principle of construction and upon the true meaning of this policy, the company are liable to pay the administratrix in this case. The language of the policy is as follows. [The learned judge read the passages set out in the case.]

---

(1) 6 Q. B. D. 42.

Now the whole case depends on the true construction of the words in the proviso, because in this case the deceased person having fallen down accidentally in a fit from the platform of the railway on to the rails was, while lying there, accidentally run over by a train that happened at that moment unfortunately to come up, and he was undoubtedly killed by the direct external violence of the engine upon his body, which caused his death immediately. The question arises whether, according to the true construction of the proviso, it can be said that this is a case of death arising from a fit; because if this death did not arise from the fit, according to the true construction of the policy, the remainder of the clause does not come into existence at all, and is inapplicable. It seems to me that the well-known maxim of Lord Bacon, which is applicable to all departments of the law, is directly applicable in this case. Lord Bacon's language in his Maxims of the Law, Reg. 1, runs thus:—"It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause." Therefore, I say according to the true principle of law, we must look at only the immediate and proximate cause of death, and it seems to me to be impracticable to go back to cause upon cause, which would lead us back ultimately to the birth of the person, for if he had never been born the accident would not have happened. The true meaning of this proviso is that if the death arose from a fit, then the company are not liable, even though accidental injury contributed to the death in the sense that they were both causes, which operated jointly in causing it. That is the meaning in my opinion of this proviso. But it is essential to that construction that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so, because you can shew that another cause intervened and assisted in the causation.

Now if the argument of the defendants be a good one, this absurdity would follow. Supposing a man were out in the field following sports, and he were to be seized with a fit, either a fainting fit or epileptic fit, or any other fit, and had retired to one side of the field and remained there recovering from the fit, and being there, a sportsman, not knowing he was there, accidentally shot him, it might be said, in the same manner, that the cause of death arose from a fit. It seems to me only to require to be stated, to shew the entire absurdity of it. The only difference between that case and this is in the time that intervened between the time of the fit and the person being placed within the influence of the succeeding accident, which in this case was very short; but I fail to see in point of reason that there is any difference between one hour or one minute or one day. The break in the chain of causes seems to be equally complete.

I therefore put my decision on the broad ground that, according to the true construction of this policy and this proviso, this was not an act arising from a fit, and therefore whether it contributed directly or indirectly or by any other mode to the happening of the subsequent accident seems to me wholly immaterial, and the judgment of the Court ought to be in favour of the plaintiff.

Judgment for the plaintiff.

Solicitor for plaintiff: *C. J. Allen.*
Solicitors for defendants: *Wynne-Baxter & Rance.*

A. P. S.

[IN THE COURT OF APPEAL.]

1881
May 24.

10QBD 272

HARE, APPELLANT; THE CHURCHWARDENS AND OVERSEERS OF PUTNEY, RESPONDENTS.

Poor-rate—Occupier ceasing to occupy—Liability to pay Rate—Beneficial Occupation—Bridge free of Toll—32 & 33 *Vict.* c. 41, s. 16.

An occupier assessed in a poor-rate, but who ceases to occupy before the rate has been wholly discharged, is not relieved by 32 & 33 Vict. c. 41, s. 16, from liability to pay the whole rate, unless some one succeeds or comes into the occupation who is liable to pay a proportionate part of such rate, and, *semble*, that such occupier remains liable to the whole rate until the name of some one liable to be assessed is substituted for his in the rate book.

The Metropolitan Board of Works purchased Putney Bridge of the Fulham Bridge Company, who transferred the bridge to the board under the provisions of an Act of Parliament which required the tolls in respect of the bridge to cease, and enacted that the bridge should be open free to the public and should be maintained by the board, the justices of Surrey paying an annual sum to the board in discharge of the liability of that county to maintain the bridge. Before the transfer the Fulham Bridge Company received tolls for the passage over the bridge, and were duly assessed in the poor-rate in the parish of Putney in respect of the bridge, and at the time of the transfer there remained undischarged a rate for which the bridge company had been so assessed, and which had been made by that parish for a period extending beyond the transfer:—

Held, that the board had no beneficial occupation of the bridge in respect of which they were capable of being rated, and that therefore as there was no succeeding occupier liable to be rated the bridge company remained liable for the whole rate.

APPEAL from a decision of the Exchequer Division on the following case, stated by the justices for the county of Surrey under 20 & 21 Vict. c. 43.

Upon the hearing of a summons and complaint, prepared by the respondents against the appellant as solicitor to the Fulham (otherwise Putney) Bridge Company, to shew cause why he had not paid the rates hereinafter mentioned, the justices decided that the company was liable to pay the whole of the rates, and not a part only, as was claimed by the appellant, but at the request of the appellant the justices agreed to state a case for the opinion of the Court upon the question of law arising out of the following facts:—

By 12 Geo. 1, c. 36, amended by 1 Geo. 2, c. 18, certain com-

1881

HARE v. OVERSEERS OF PUTNEY.

missioners and trustees were empowered to build a bridge across the river Thames from the town of Fulham in Middlesex, to the town of Putney in Surrey, and in order to defray the charge and expense of erecting and building the bridge, and repairing, preserving, and supporting the same, and the ways and passages thereto, from time to time, they were empowered to levy certain tolls which were to be applied for that purpose. By the latter Act the commissioners were empowered to assign the tolls in perpetuity or otherwise to persons who should undertake to contract and agree to erect and build the bridge, and preserve and keep up the same in good and sufficient repair, and should give sufficient security so to do. The commissioners accordingly assigned the tolls in perpetuity to subscribers who so undertook, contracted and agreed, and gave security as aforesaid. The said subscribers and their successors built and sustained the bridge, and levied tolls for the passage thereover since that time, and applied the same for the purposes aforesaid as by the said Acts provided. By the Thames Navigation Act, 1870, s. 10, the bridge and the lands thereunto belonging, and the tolls, revenues, and profits and income belonging to the same, were vested in a committee of management consisting of six of the shareholders, and their successors for the time being, upon trusts as to all but the profits for the general purposes of the bridge, and as to the profits (if any) for the shareholders. This corporation is the Fulham Bridge Company, referred to in the schedule to the Metropolis Toll Bridges Act, 1877. (1)

The bridge consisted of the bridge built on piers, approaches and approach roads thereto, together with toll-houses and a residence for the clerk of the company, and was duly rated both in the parishes of Putney and Fulham. (2)

By the Metropolis Toll Bridges Act, 1877, (1) the Metropolitan Board of Works were empowered to purchase the bridge. The board accordingly purchased the same and paid the purchase-money in the manner provided by the Act on the 25th of June,

---

(1) 40 & 41 Vict. c. xcix. (local), the material sections of which are set out in note (2), post p. 227.

(2) It was admitted by the appellant's counsel on the argument that the toll-house and residence were on the Fulham side of the bridge, and not in the parish of Putney.

1880, and a receipt therefor was given on the same date. On the 26th of June, 1880, the bridge was thrown open to the public free from toll, and possession was taken at the same time by the chairman of the board on behalf of the board. From that date the bridge and its appurtenances became thenceforth transferred to and vested in the Metropolitan Board of Works under the provisions of the Metropolis Toll Bridges Act, 1877, and the said board have had the absolute control of the same. Since the 26th of June, 1880, the connection of the bridge company with the bridge and its appurtenances has altogether ceased.

Before the 25th June, 1880, certain rates had been duly made, allowed, and demanded in and for the parish of Putney, and were then current, viz., a poor-rate dated the 24th of April, 1880, a sewers-rate, a general rate, and a metropolitan consolidated rate dated the 1st of May, 1880. All these rates were made for periods extending beyond the 26th of June, 1880, and at that date and since remained undischarged in respect of the Putney Bridge.

It was admitted before the justices by the appellant's counsel that if the respondents had insisted on the payment of the rates prior to the transfer of the bridge the company would at that time have been bound to pay the whole of the rates as a matter of law.

By s. 16 of the Poor-rate Assessment and Collection Act, 1869, 32 & 33 Vict. c. 41, it is enacted as follows:—"If the occupier assessed in the rate when made shall cease to occupy before the rate shall have been wholly discharged, or if the hereditaments being unoccupied at the time of the making of the rate become occupied during the period for which the rate is made, the overseers shall enter in the rate book the name of the person who succeeds or comes into the occupation, as the case may be, and the date when such occupation commences, so far as the same shall be known to them, and such occupier shall thenceforth be deemed to have been actually rated from the date so entered by the overseers, and shall be liable to pay so much of the rate as shall be proportionate to the time between the commencement of his occupation and the expiration of the period for which the rate was made, and an outgoing occupier shall remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made, and the 12th section of the statute 17 Geo. 2, c. 38, shall be repealed."

On behalf of the appellant it was contended that under the above circumstances the bridge company was liable for so much and no more of the above rates respectively as is proportionate to the time of their occupation within the periods for which the rates were respectively made, and it was also contended that the Metropolitan Board of Works were in occupation of the bridge.

On behalf of respondents it was contended that the bridge company being duly rated, the Acts constituting the bridge company were immaterial, that s. 16 of 32 & 33 Vict. c. 41, did not apply to the present case, as there was no succeeding occupier who could be rated to the said rates, the Board of Works having no beneficial occupation of the bridge, and on this point *Overseers of Werburgh* v. *Hutchinson* (1) was cited before the justices. The respondents further contended that under the circumstances herein set forth the bridge company were by the provisions of the Metropolis Toll Bridges Act, 1877, and especially so by ss. 15 to 18, bound to pay the rates. The justices decided to issue their warrant of distress for the whole of the rates.

The Exchequer Division were of opinion that the decision of the justices was right.

The appellant, on behalf of the Fulham Bridge Company, appealed.

A. Charles, Q.C., and *Danckwerts,* for the appellant. The question of the liability of the Bridge Company, whom the appellant represents, depends on the true construction of s. 16 of 32 & 33 Vict. c. 41. That section relieved the company from liability to pay the whole of the rate when they ceased to occupy or to have any connection with the bridge, which was when the bridge was transferred to and taken by the board. The terms of this s. 16 are very different from those of s. 12 of 17 Geo. 2, c. 38, which it repeals, and on which *Edwards* v. *Overseers of Rusholme* (2), was decided.

[BRETT, L.J. Section 16 requires the overseers to enter in the rate book the name of the person who succeeds or comes into the

(1) 5 Ex. D. 19.

(2) Law Rep. 4 Q. B. 554.

1881

HARE
v.
OVERSEERS OF
PUTNEY.

occupation. It is admitted, of course, that in the present case they have made no alteration in the rate book.]

Yes, but what the overseers are bound to do must be taken, as against the parish, as if it had been done.

[BRETT, L.J. But suppose not only that they have not made such an entry, but that they could not make it, because there has been no succeeding occupier liable to be rated.]

The omission of the overseers to enter the name of the new occupier does not make the outgoing occupier liable, nor is it a condition precedent to the exoneration of the latter that the name of such new occupier should be on the rate book. Sect. 16 says expressly that "an outgoing occupier shall remain liable in like manner for so much and *no more* of the rate as is proportionate to the time of his occupation within the period for which the rate was made." There are no such words as these in the repealed s. 12 of 17 Geo. 2, c. 38.

[BRETT, L.J. What meaning do you give to the words "in like manner"?]

The same right to appeal against the proportion of the rate as such occupier would have if he were liable to the whole rate. The justices and also the Divisional Court acted on the authority of *Overseers of Werburgh* v. *Hutchinson* (1), where no doubt it was decided that the outgoing occupier is not relieved unless he is succeeded by an occupier who is liable to pay a proportionate part of the rate, but that case was wrongly decided and ought to be overruled.

Next, the Metropolitan Board entered into the occupation of the bridge, and their occupation is a rateable one although its rateable value may be nil. The bridge was transferred to and vested in the board by 40 & 41 Vict. c. xcix (local) (2), as soon as the purchase-money was paid, and they receive an annual sum

---

(1) 5 Ex. D. 19.

(2) By 40 & 41 Vict. c. xcix (local), entitled "an Act to provide for throwing open for the free use of the public certain toll bridges within the Metropolis," power is given to the Metropolitan Board of Works to purchase of certain companies, comprising, amongst others, the Fulham Bridge Company "the bridge of such company and the approach roads to, and toll-houses on or near the same, and all lands and works necessarily occupied or used for the purposes of the same, and all rights, powers, and authorities, and privileges of such company in relation thereto

1881

HARE
v.
OVERSEERS OF
PUTNEY.

from the justices of Surrey towards the maintenance of the bridge, the occupation of which is a beneficial one.

[BRAMWELL, L.J. The whole is dedicated to the public.]

The bridge and its approaches are capable of being utilised. The board might let out a portion for advertisements or other purposes. It is a hereditament, and is different from a street,

---

under their special Act or otherwise." The following are the only sections to which it is necessary to refer:

Sect. 15. "When the receipt for the amount of the consideration or for the amount payable as a first payment of any such rent-charge as aforesaid on account of the consideration agreed upon or so ascertained as aforesaid, to be paid for the purchase of the undertaking of any company, has been signed in manner directed by this Act, then such undertaking shall, by virtue thereof and of this Act, be transferred to and vested in the board, and they shall be entitled to immediate possession, and they shall have absolute control of such undertaking, freed and discharged from all leases, contracts, debts, charges, and liabilities whatsoever of the company affecting the same, and thereupon all duties, obligations, and liabilities of the company in respect of the same shall, save as by this Act expressly provided, absolutely cease and determine.

Sect. 16: "After the board has acquired absolute control of any undertaking, the tolls and charges arising from or in connexion with the bridge or bridges comprised in such undertaking shall cease to be levied thereon, and the said bridge or bridges shall be open free to the public, and the said bridge or bridges specified in part I. of the schedule to this Act," (and Putney bridge is one of the bridges so specified), "and the roads over the same shall be maintained and repaired by the board, and the said bridges shall not be or become county bridges, but the approach roads thereto shall be public highways maintainable and repairable as other highways in the parish or district in which the same shall be situate respectively," &c.

Sect. 18: "If at any time after the transfer of the undertaking of any company any claim is lawfully made for any debt or sum of money which at the time of the transfer is due or owing from such company for, on account, or in respect of such undertaking, and is not paid or discharged by them, the company shall, notwithstanding such transfer, be liable to satisfy such claim out of any assets of the company."

Sect. 27: "The justices of the peace of the county of Middlesex, and the justices of the peace of the county of Surrey, shall each pay to the board the sum of twelve hundred pounds annually, by quarterly instalments, in perpetuity out of the rates of those counties respectively, the first quarterly payment to be made at the expiration of three months from the date of the free opening of the bridges specified in Part I. of the schedule to this Act annexed; and such sums respectively shall be in full discharge in perpetuity as aforesaid of any liability of the inhabitants of those counties respectively to maintain, repair, or reconstruct any of such bridges, situate wholly or partially within such counties respectively."

and if not beneficially occupied is capable of a beneficial occupation, and is therefore liable to be rated according to the rule laid down by the House of Lords in *Mersey Docks* v. *Cameron* (1), and which has been followed in *Greig* v. *University of Edinburgh* (2), and *Governors of St. Thomas's Hospital* v. *Stratton.* (3)

Jelf, Q.C., and *Morton Smith*, for the respondents. The bridge company are primâ facie liable for the rate, and they have to shew their exoneration. The 16th section of 32 & 33 Vict. c. 41, makes it a condition precedent to the outgoing occupier being liable for a proportionate part only of the rate that the name of the succeeding occupier should be entered on the rate book. There is really no substantial difference between that enactment and s. 12 of 17 Geo. 2, c. 38, which were both intended to prevent the parish from losing the rates by the removal of occupiers. The 12th section of 17 Geo. 2, c. 38, recites that "persons frequently remove out of parishes and places without paying the rates assessed on them, and other persons do enter and occupy their houses or tenements part of the year, by reason whereof great sums are annually lost to such parishes and places," and though this 12th section has been repealed by 32 & 33 Vict. c. 41, s. 16, the latter did not intend that the parish should suffer by the change of occupation. That s. 16 was probably intended to remove the doubts entertained in *Flatcher* v. *Boodle* (4) as to the qualification for a borough vote of an incoming occupier where he has not paid a rate made prior to his occupation. The 40 & 41 Vict. c. xcix. (local) transferred the bridge to the board freed of all debts and liabilities, and by s. 18 the bridge company, notwithstanding the transfer, were to be liable to satisfy any claim for a debt due at the time of such transfer, and this rate, which had not been discharged, was a debt due by the company. Next, the board have no beneficial occupation, and cannot be rated in respect of their occupation of the bridge. It is like the possession of the sewers by the Metropolitan Board of Works, which, whether above or underground, have been held to have no occupation value, and therefore not rateable to the poor-rate:

---

(1) 11 H. L. C. 443. 11 Jur. N.S. 746

(2) Law Rep. 1 H. L., Sc. 348.

(3) Law Rep. 7 E. & I. App. 477.

(4) 18 C. B. (N.S.) 152; 34 L. J. (C.P.) 77. 11 Jur. N.S. 67

1881

HARE
v.
OVERSEERS OF
PUTNEY.

Reg. v. *Metropolitan Board of Works* (1), and *Metropolitan Board of Works* v. *West Ham Overseers.* (2) The present case is governed by that of *Overseers of Werburgh* v. *Hutchinson.* (3)

A. Charles, Q.C., in reply. This bridge is different from the case of the sewers, because it has an occupation value.

[BRETT, L.J., referred to *Mayor, &c., of Lincoln* v. *Holmes Common.* (4)]

There, as the corporation occupied, subject to a right of common which exhausted the profits, it was held that either they had no beneficial occupation or the rate must be reduced to nothing. If the occupation of the board is less valuable than that of the bridge company, the assessment may be altered.

BRAMWELL, L.J. I think that this judgment must be affirmed. It is impossible to speak with any very great confidence as to the meaning of this 16th section of 32 & 33 Vict. c. 41, but I think it is tolerably clear that there was no intention in the legislature that after a rate had once been properly made, to which somebody was liable, the parish should ever lose any part of that rate: on the contrary, it was intended that the whole of it should be paid by somebody. The section begins, "If the occupier assessed in the rate when made shall cease to occupy before the rate shall have been wholly discharged"—that is one condition of things—"the overseers shall enter in the rate book the name of the person who succeeds or comes into the occupation as the case may be," and after providing for his liability to pay a proportionate part of the rate, the section concludes by saying, "an outgoing occupier shall remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made." Now it seems to me that those words to which I have called attention contemplate one person going and another succeeding him without any interval of time between them. The other thing contemplated by the statute is, "or if the hereditaments being unoccupied at the time of the making of the rate become occupied during the period for which the rate is made."

(1) Law Rep. 4 Q. B. 15.
(2) Law Rep. 6 Q. B. 193.
(3) 5 Ex. D. 19.
(4) Law Rep. 2 Q. B. 482.

It seems to me that the statute had two objects in view; one was that the parish should never lose any part of a rate which was properly made upon somebody who was occupier at the time when it was made, and who was assessed to it; and another was, that if the premises were unoccupied at the time of making the rate, but became occupied afterwards, the person who so became the occupier should be liable to a proportionate part of the rate. The words "and an outgoing occupier shall remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation," are not, I think, to be looked at as though there were nothing else in the section, for if it had been the intention of the legislature to make the occupier who was assessed liable only in respect of the time during which he occupied, it would, I think, have made some provision that if he left, having paid his rate before the whole of the period over which it extended had expired, he should have some portion of it returned to him, because there is no reason why a person who has not paid his rate should thereby have an advantage which he would not have had if he had paid it. Why the legislature intended what it seems to have intended one cannot very clearly know; still I think it did not intend that the parish should ever lose any part of a rate duly made when there was somebody at the time it was made who was liable to pay the whole of it.

Then, that being so, the question we have to consider here is, whether the bridge company having ceased to be occupiers, anybody else has occupied so as to be liable for the portion of the rate after the bridge company ceased to be occupiers. I think there is no evidence of anyone else being such occupiers. I cannot find that the Metropolitan Board of Works are the occupiers of this bridge. No doubt the property is in them, and the property draws to it the possession. An action of trespass to the bridge would have to be brought by them, but that does not make them occupiers so as to be liable to be rated. There is no beneficial occupation by them. I doubt whether we ought to take any judicial notice of what Mr. Charles ingeniously suggests, that the board might make a profit by letting people stick advertisements upon the bridge. Nothing of that sort is stated in the case, nor ought it to have been; but even supposing that some money might be got by it, it does not follow that it would be a beneficial occupation, because the burden of the repairs, as against whatever profit might be got if let to the imaginary tenant from year to year, would be so great, that probably no benefit would be got from it at all. I think there was here no beneficial occupation by the Metropolitan Board. If there was then the board ought to have been assessed in respect of the sewers in the cases which have been referred to. This is enough to dispose of this matter and to enable us to say that the judgment should be affirmed, but I may add that I am inclined to think it is a condition precedent to the exoneration of the outgoing occupier, that the name of the person who comes in and succeeds, and the date when such occupation commences so far as the overseers can tell, should be entered by the overseers in the rate book. It struck one that it was a little strange that the parish should be able to say our overseers ought indeed to have done this, but they have not, and therefore the parish has a claim against the outgoing occupier which it would not have had if the overseers had done it. I think, however, that the answer to this is that if the overseers ought to have done it the parish cannot lose in consequence of their not having done it, and that the occupier, who ought to see that they do it, has perhaps a remedy against them for not exonerating him as they ought to have done. Be that as it may, on either ground I think this appeal should be disallowed, and the judgment affirmed.

BRETT, L.J. In this case a summons was taken out against the appellant, as the representative of the Fulham Bridge Company, in order to enforce the payment of certain rates which had been made at the time they were the beneficial occupiers of Putney Bridge; and the answer by the company was that they were not liable for the whole but only for a portion of such rates, because before the whole time for which such rates had been made had run out they had ceased to be occupiers of the bridge, and this is true. It was urged that upon this ground alone the bridge company were only liable to pay a portion of the rates; and further, that if that was not sufficient to excuse them, then the Metropolitan Board of Works came into possession of the bridge under such circumstances that the board ought to be assessed for the remaining portion of the time after they so came into possession, and that for that reason the bridge company ceased to be liable, except for the portion of time during which they were in occupation. Now, in answer to the latter point, it is said by the respondents, first, that the Metropolitan Board of Works never were rated, and that at all events the liability of the bridge company did not cease until the Metropolitan Board of Works were rated; and, secondly, that the Metropolitan Board of Works never could be rated in respect of this bridge, because they were never occupiers of it, or even if they were, they were not beneficial occupiers. It is perfectly clear that the Metropolitan Board of Works were never rated, because they could not be rated until their name was put upon the rate book, and that has never been done. Then comes the question, could they be rated? They could only be rated if they were occupiers, and beneficial occupiers. In the first place, looking at the statute which puts Putney Bridge into the possession of the Metropolitan Board of Works it seems to me that they were never occupiers at all. They are no more occupiers of the bridge than the owner of a street is the occupier of a street after it has been dedicated to the public. It seems to me that the Metropolitan Board of Works have no power to do anything to or on the bridge except keep it up for the benefit of the public. The public have a right to use the whole of the bridge and have not merely a right of way across it. The whole bridge is to be kept up for the use and benefit of the public. Therefore it seems to me that the Board of Works never were occupiers. But supposing that they might be said to be occupiers in one sense, still it is necessary in order that they should be rateable, that the occupation should be a beneficial one. I take it that the test of that is that which is stated by Lord Justice Mellish in his argument when at the bar in *Reg.* v. *Metropolitan Board of Works* (1), and which seems to me to have been adopted by the Court, namely, that there is no beneficial occupation, if by law no benefit can possibly arise to the occupier. If it is merely by his own volition that he is not receiving a benefit which by law he might receive, then there is

(1) Law Rep. 4 Q. B. 15, at p. 25.

1881

HARE v. OVERSEERS OF PUTNEY.

Brett, L.J.

that which is called a potential beneficial occupation; but where by law no benefit can arise to him, then although there is an occupation it is not in poor law a beneficial occupation.

Now, according to my opinion, it is impossible that the Metropolitan Board of Works ever could be beneficial occupiers of this bridge. It is said that the case is like that of *Mersey Docks* v. *Cameron.* (1) The question is whether it is like the cases of *Reg.* v. *Metropolitan Board of Works* (2) and *Metropolitan Board of Works* v. *West Ham Overseers* (3), in which the main sewers were decided to be not rateable, because their occupation by the Metropolitan Board of Works was not and could not be beneficial, and it seems to me that this is like the case of the main sewers. Therefore, both on the ground that they are not occupiers, and secondly on the ground that if occupiers they are not and never could be beneficial occupiers, they are not liable to be rated. Not only were they not rated, but they could not be rated. The case is then reduced to this: that the bridge company were rateable, and rated at the time when the rate was made, but that they ceased to occupy during the period over which that rate was made, and that they were not replaced by anybody who was actually rated or liable to be rated.

The question is whether under these circumstances they are released from any portion of the rate. That depends upon the construction of s. 16 of 32 & 33 Vict. c. 41. It was passed, I think, on the same lines as 17 Geo. 2, c. 38, s. 12, and quite as much to protect the parish as to protect the persons rated. It seems to me that the true construction of it is that the person who is liable to be rated, and who is rated at the time when the rate is imposed, remains liable to pay the whole of that rate until somebody else is substituted for him, who is not only liable to be rated, but who is actually rated. The latter part of this section was probably introduced for this reason: where a person is rated upon the rate, and a second person is put upon the same rate, not as a person to be rated jointly with him, but in substitution for him for a portion, it might have been said that, as there cannot be two persons on a rate rated at the same time in respect of different liabilities to be rated, therefore the putting the second party on the rate and rating him would have freed the first person; and the latter part of this section is in order to meet that difficulty, and to prevent it being said that the putting of the second person on the rate-book under the circumstances would relieve the first from his proportion. Therefore, the section says that although the second person is put upon the rate and is to be liable for the portion of time during which he is on the rate, nevertheless the other is to remain liable in respect to his proportion. If that be so then the construction of the section is that the first person who has been rated, and was at that time liable to pay the whole rate, remains liable to pay the whole until some person is substituted in his place who is made liable for a portion. If that be the true construction, the bridge company would not be relieved until the Metropolitan Board of Works were rated, and they never were rated. It might be that if the Metropolitan Board of Works were rateable, that the overseers might be liable to the Putney Bridge Company for not putting the board on the rate-book; but that would not affect the question upon the construction of this section, and the Putney Bridge Company would remain liable, because the others were not rated. However, according to my view the overseers who did not rate the Metropolitan Board of Works need not be afraid, because I think that the board were not rateable. Therefore, on all grounds the bridge company remain liable to pay the whole rate, and it was the duty of the overseers to enforce the whole rate as against them. I think, therefore, the judgment ought to be affirmed.

---

(1) 11 H. L. C. 443. 11 Jur NS 746 (2) Law Rep. 4 Q. B. 15.

(3) Law Rep. 6 Q. B. 193.

COTTON, L.J. I am of the same opinion. The first question is, what is the true construction of the 16th section of 32 & 33 Vict. c. 41; but before one deals with it let us see what was the position of the bridge company if this enactment had not existed. Notwithstanding that they had ceased to occupy, they would have been undoubtedly liable to pay the whole of the rate, and it is admitted that they could have been compelled at once to pay the whole of it directly the rate was made.

Now what is the effect of this 16th section? The bridge company claim exception under the latter part of it, and the position of that portion of the section on which they rely is, I think, material, because it comes after that portion of the section which renders liable a person who comes in after the time when the rate was made, and he is made liable only after the overseers have entered his name in the rate book. Then is it intended to relieve the occupier who is assessed but who thus ceased to occupy, when no one else is made liable? If so, I should have expected to have found a provision in the first part of the section that if the occupier assessed in the rate when made shall cease to occupy before the rate shall have been wholly discharged, he shall be liable only for so much and no more of the rate as is proportionate to the time of his occupation, but that is not so. But one finds such only after a provision rendering another person liable. There is then this difficulty—instead of saying the outgoing occupier shall remain liable, the section uses only a general term and says "an outgoing occupier," still I think the use of that word "an" is not sufficient to alter what I think is the fair construction of this part of the clause. When one looks at the words they are hardly those which would have been used if it had been intended to relieve the outgoing occupier from liability, although nobody else came in, because the words are, "shall remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation." They are not words of exoneration or relief, but they are words declaring that he shall remain liable, although liable it is true for so much and no more of the rate as is proportionate to the time of his occupation. They, in my opinion, point to this, that when another person has come in and has been put upon the rate book, then the outgoing occupier is not to be exonerated, by what has been done, from any liability in respect of the rate, but only so far as there is some one else substituted for him who is on the rate book, and made so liable for his proportion of the rate.

That being so, how do the facts appear as stated on the case? If it were necessary, I should be of opinion that, whatever might be the liability of the overseer for neglecting the duty cast upon him, until there is somebody actually on the books liable for the rate, the outgoing occupier remains liable for the whole.

There must, however, be some one coming into occupation who was capable of being made liable for the rate, and in my own opinion the Metropolitan Board of Works were not capable of being made so liable. The property, consisting of a bridge and its approaches, is vested in them solely for the purpose of being used and kept for the benefit of the public, without paying toll for passing on it. They are possessed of it as owners for the benefit of the public, and if the case turned upon it I should say that they were not occupiers, but owners only as custodians for the public. There is certainly no beneficial occupation of the bridge. The property is by Act of Parliament kept and appropriated to a special and particular purpose, and as long as that lasts it is impossible to say that any profit may be derived from it—that it could ever be possibly let for any sum to anyone, taking into consideration the use to which, by Act of Parliament, it must be applied, and the necessity of keeping it useful for that purpose. It is impossible, therefore, to say that it has any potentiality of a beneficial occupation. It is, to use the words of Lush, L.J., in *Metropolitan Board of Works* v. *West Ham* (1), like a barren rock as long as the Act of Parliament says it must be used for this purpose and no other. Therefore, upon all those grounds, the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Hare & Fell.*
Solicitor for respondents: *W. Reeve.*

W. P.

---

(1) Law Rep. 6 Q. B. 193.

1881
June 3.

WHITE, Appellant; THE JUSTICES OF COQUETDALE, Respondents.

Licensing Acts—Alehouse—Licence for Sale of Exciseable Liquors—Death of Licence-holder before Expiration of Licence—Expiration of Licence—Application to Special Sessions—9 *Geo.* 4, *c.* 61, *ss.* 4, 13, 14.

11 QBD 642
645-6

K. licensed to sell intoxicating liquors under 9 Geo. 4, c. 61, died on the 27th of September. At the general annual licensing meeting on the 2nd of October application was made by the lessees of the house for a fresh licence, without giving the requisite notices under 35 & 36 Vict. c. 94, as there was no time to give them. This application was rejected on the ground that they were not in occupation of or about to occupy the premises. K.'s licence expired on the 10th of October. On the 13th of November W., as assignee of the heir of K., gave notice that he would apply at the special sessions on the 4th of December for a new licence in respect of the house under 9 Geo. 4, c. 61, s. 14:—

Held, following *Simpkin* v. *Justices of Birmingham* (Law Rep. 7 Q. B. 482), that the justices had no jurisdiction to entertain the application, as it was made after the expiration of the period for which the previous licence remained in force.

Case stated under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, s. 33.

Ann Knox, of Alnwick, was licensed to sell intoxicating liquors in a house called the Grapes Inn, and her licence expired on the 10th of October, 1880. The premises had been licensed for upwards of forty years, and there was no conviction against the licence. The annual licensing meeting for the division was held on the 4th of September, 1881, but in consequence of the pressure of other matters no licensing business was then done, and the meeting was adjourned until the 18th of September, and from that day to the 2nd of October. On the 25th of September notice was given to Mrs. Knox by the superintendent of police of his intention to object to the renewal of her licence, on the ground that she was from age and want of proper assistance not a proper person to hold a licence, but this matter was not entered upon before the magistrates, for Mrs. Knox died on the 27th of September. On the 2nd of October Messrs. Cockburn, brewers, the lessees of the licensed premises, without having given the requisite notices, which they had no time to give, asked the magistrates if they could allow the licence to be issued in their names, but this the magistrates refused to do, stating that they would only grant a licence to some one occupying, or being about to occupy, the premises.

The sale of liquors was carried on in the house until the expiration of the licence on the 10th of October, 1880, and no penalty is incurred by the heirs, executors, or administrators of any licensed person in respect of such sales up to the next special sessions (35 & 36 Vict. c. 94, s. 3).

On the 6th of November, the day on which the next special sessions were held for the transfer of alehouse licences, no application was made respecting the above-mentioned premises. On the 13th of November the appellant, John White, gave notice that he would at the following special sessions for the transfer of alehouse licences on the 4th of December make application under 9 Geo. 4, c. 61, s. 14, for a licence to sell intoxicating liquors on the above-mentioned premises, upon the ground that the late tenant, Ann Knox, duly licensed, had died before the expiration of the licence, and that Thomas Crisp, the heir of the said Anne Knox, had made over his interest in the occupation and keeping of such premises to the said John White.

It was contended on the part of the appellant, that he had brought himself within the provisions of the Act; that Mrs. Knox died before the expiration of the licence; that the heir had assigned over his interest to the appellant without delay; that the section gave the justices full power to grant the licence to the appellant; that such licence would continue until the 10th of October next after the grant of such licence; that there was no special sessions before the 10th of October, and that by reason of the act of God, namely, the death of Mrs. Knox, it was quite impossible to give the necessary notices before the 10th of October last, and that to grant a licence which would expire on the 10th of October last would have been of little or no use, for what was wanted and intended by the Act was to grant a licence which would continue in the present case during the following year.

The justices considered that after the decision in *Ex parte Todd* (1), where it was said the new tenant spoken of in s. 14

---

(1) 3 Q. B. D. 407.

must come in during the continuance of the licence, they had no jurisdiction, and that the power of granting a licence under this section applied only to the period for which the former tenant's licence would have lasted; and that, at any rate as there was time to do so, the application should have been made, or the notice of the application given, before the expiration of the old licence. They also considered that the heirs or executors of Ann Knox had not made over their interest in the occupation and keeping of the house before the 10th of October, and that, therefore, no licence was in force when the assignment was made to the applicant. They came to the conclusion that as no step whatever had been taken during the currency of the licence, they had no jurisdiction to grant the application.

The question for the opinion of the Court was whether the justices had such jurisdiction.

May 21. *H. Manisty*, for the appellant. No application for a fresh licence could have been made at the general licensing sessions by any new tenant or representative of Ann Knox, for there was not time to give the requisite notices under 35 & 36 Vict. c. 94, s. 40, preliminary to transfer. Any new tenant of the premises might, therefore, apply at the special sessions: *Reg.* v. *Middlesex* (1); and the fact that no application was made in November does not affect the rights of the applicant. The Act 9 Geo. 4, c. 61, s. 14, contemplated the grant of a new licence to the representatives of a deceased licence holder to expire on the October following the date of its being granted. Unless provision to this effect were made, the death of a licence holder on the eve of the licensing meeting would cause the premises to remain unlicensed for a considerable period, to the detriment of the owner, and without any default on his part.

[FIELD, J. You have to distinguish this case from *Ex parte Todd* (2), where it was held that the power of granting a licence to a new tenant under s. 14, extends only to the period for which the former licence would have lasted.]

Here no application could have been made while the licence was in force.

---

(1) Law Rep. 6 Q. B. 781.

(2) 3 Q. B. D. 407.

No counsel appeared for the respondents.

Cur. adv. vult.

June 3. The judgment of the Court (Field and Bowen, JJ.) was delivered by

FIELD, J. This is a case stated by justices, raising a question which arose under the following circumstances: The appellant White applied to justices for a licence. Ann Knox, in September, 1880, was the holder of a licence for a public-house, which would, in accordance with the general law regulating the duration of licences, have expired on the 10th of October. The inspector of police had, in August, intimated to her that she was too old and infirm to continue to have a licence, and that he must so report at the general annual licensing meeting which was fixed for the 2nd of October. On the 27th of September Mrs. Knox died, and thus her licence was determined before the period for which it was granted had fully elapsed. On the 2nd of October, at the general licensing meeting, Messrs. Cockburn, brewers, the lessees of the premises, made an application for a licence, which was necessarily unsuccessful, for they were neither occupiers of nor about to occupy the premises. At the next licensing sessions on the 6th of November, no application was made, but on the 14th of November the appellant gave notice that he would, at the next special sessions, apply for a licence, stating that he was the representative of the heir of Ann Knox. He did make the application, but the justices refused it on the ground that it was made after the 10th of October, when they had no power to grant it, and they relied, and I think rightly, on *Ex parte Todd.* (1)

The law governing the application is contained in 9 Geo. 4, c. 61. By s. 4 of that Act, the justices at the general annual licensing meeting are to appoint special sessions to be holden in the year following, at which special sessions it shall be lawful to license persons intending to keep inns theretofore kept by other persons who are about to remove from such inns, as the justices shall deem fit and proper persons to be licensed. By s. 13, every licence . . . . shall be in force elsewhere than in Middlesex and

---

(1) 3 Q. B. D. 407.

Surrey from the 10th of October after the granting thereof for one whole year and no longer. So that if the licence were granted on the 10th of October it would be for one year neither more nor less, but if granted at later date than the 10th of October it would probably be in terms for one year, but it would end on the 10th of October then next, for it is essential that it should last for one year and no longer. By s. 14, if any person duly licensed under the Act shall [before the expiration of such licence] die, &c., it shall be lawful for the justices at special sessions to grant to the heirs, executors, or administrators of the person so dying, or to any person to whom such heirs, executors, or administrators shall have bonâ fide conveyed their interest in the occupation or keeping of such house, a licence; provided that such licence shall continue in force only from the day on which it shall be granted until—the 10th day of October then next ensuing. These words shew that the licence to be granted at special sessions may be for a less period than a year, and they may therefore operate as a qualification upon the general words in s. 13. *Simpkin* v. *Justices of Birmingham* (1) has decided that it is essential that at the time of the application to the special sessions for an interim licence, the person giving up possession should be a "licensed person." In that case the former licence expired on October 10, but the holder remained in occupation till the 13th, when he gave up possession to the person who applied to the special sessions. He was not, therefore, at the time of his giving up possession a "duly licensed person;" and it was accordingly held that the title of the applicant had not accrued before the expiration of the licence. In *Ex parte Todd* (2) the principle was carried still further. That was the case of a licensed person giving up possession before the expiration of the licence, and an application by a succeeding tenant after the expiration of the period for which the previous licence remained in force. The Court held, in accordance with my argument in the previous case of *Simpkin* v. *Birmingham* (1), that the general intention of the Act was to have houses licensed throughout the country for one fixed term from October 10 in each year. But in order to prevent injustice to the owner of the house from its remaining unlicensed for any length of time owing to the death, bankruptcy, or neglect of the previous tenant the legislature provided for a series of events in which such an injustice might arise, and power was given to the special sessions to grant licences till the 10th of October following.

---

(1) Law Rep. 7 Q. B. 482.

(2) 3 Q. B. D. 407.

The judgments of Cockburn, C.J., and Manisty, J., in *Ex parte Todd* (1) clearly explain the effect of s. 14 with regard to the duration of licences.

It must be admitted that there may be hardship in the present case, but it is one for which the legislature has not provided.

I will in conclusion refer to *Reg.* v. *Middlesex* (2) to shew that I have not overlooked it. At first sight it is rather in favour of the appellant, but when examined it will be found to be no authority in his favour, and if it were it must be taken to be overruled by the later cases.

I think the justices were quite right, and that they had no jurisdiction to grant the licence. In this judgment my Brother Bowen concurs.

Judgment for the respondents.

Solicitors for applicant: *Shum, Crossman, Crossman, & Prichard, for Middlemas, Alnwick.*

(1) 3 Q. B. D. 407.

(2) Law Rep. 6 Q. B. 781.

A. P. S.

1881
June 18.

[CROWN CASE RESERVED.]

THE QUEEN *v.* MOST.

Murder, endeavouring to persuade, or encouraging to commit—Foreign Sovereign, Newspaper Article inciting to Murder of—24 & 25 *Vict. c.* 100, *s.* 4.

M. was indicted under 24 & 25 Vict. c. 100, s. 4. The encouragement and endeavour to persuade to murder, proved at the trial, was the publication and circulation by him of an article, written in German in a newspaper published in that language in London, exulting in the recent murder of the Emperor of Russia, and commending it as an example to revolutionists throughout the world. The jury were directed that if they thought that by the publication of the article M. did intend to, and did, encourage or endeavour to persuade any person to murder any other person, whether a subject of her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find him guilty:—

Held, by the Court (Lord Coleridge, C.J., Grove, and Denman, JJ., Huddleston, B., and Watkin Williams, J.), that such direction was correct, and that the publication and circulation of a newspaper article might be an encouragement, or endeavour to persuade to murder, within s. 4 of 24 & 25 Vict. c. 100, although not addressed to any person in particular.

The indictment against the accused, Johann Most, contained twelve counts.

The first count alleged that Johann Most unlawfully, maliciously, and wickedly contriving, intending and attempting, in defiance of all principles of morality and good government, to justify the crimes of assassination and murder, and also endeavouring to stir up, encourage, and incite evil-disposed persons to commit the crimes of assassination and murder on the, &c., day, &c., unlawfully, wickedly, and maliciously, did print and publish, and cause and procure to be printed and published in a certain public newspaper called *Freiheit*, a certain scandalous, wicked, malicious, and immoral libel, in the German language [this was set out verbatim in the count, and a translation given], to the utter subversion of all principles of law, morality, and good government, to the great scandal of all law established authority, and government, in contempt of our Lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace, &c.

The second count alleged that, theretofore and before the printing and publishing of the scandalous, wicked, malicious, and immoral libels and libellous matters thereinafter mentioned, there subsisted, and there then still subsisted, friendship and peace between our Lady the Queen, and her subjects, and the sovereigns and rulers of Europe and their subjects, and that Johann Most, well knowing the premises, wickedly, unlawfully, and maliciously intending and attempting, in defiance of all principles of morality and good government, to justify the crimes of assassination and murder, and also endeavouring to stir up, encourage, and incite, evil-disposed persons to conspire against the lives of the said sovereigns and rulers of Europe, and to commit the crime of assassination upon the said sovereigns and rulers, and also unlawfully, maliciously, and wickedly devising to disturb and destroy the said friendship and peace on the, &c., day, &c., unlawfully, wickedly, and maliciously, did print and publish the libel complained of [this was set out as in the first count], to the utter subversion of all principles of law, morality, and good government, &c. [as in the first count], and to the great danger of the said sovereigns and rulers of Europe, to the great danger of creating discord between our said Lady the Queen, and the said sovereigns and rulers of Europe, &c.

Upon the above two counts a separate verdict was found against the accused, and no question as to them was reserved.

The third count alleged that Johann Most unlawfully, knowingly, and wickedly, did encourage certain persons, whose names to the jurors were unknown, to murder certain other persons, to wit, the sovereigns and rulers of Europe, not then being within the dominions of our Lady the Queen, and not being subjects of the Queen, against the form, &c.

The fifth count charged that he encouraged a certain named person to murder certain other persons, to wit, the sovereigns and rulers of Europe.

The seventh count was similar to the third, except that the persons encouraged were alleged to be persons whose names were to the jurors unknown, and who on the day of the publication of the libel were subscribers to a certain newspaper called *Freiheit*.

The ninth count alleged that on the, &c., Johann Most unlawfully, knowingly, and wickedly, did encourage certain persons, whose names were to the jurors unknown, to murder a certain other person, to wit, His Imperial Majesty Alexander III., Emperor of All the Russias, not then being within the dominions of our Lady the Queen, and not being a subject of the Queen, against the form, &c.

The 4th, 6th, 8th and 10th counts were respectively similar to the 3rd, 5th, 7th and 9th, except that the charge was of "endeavouring to persuade," instead of "encouraging."

The 11th and 12th counts were similar to the 9th and 10th respectively, except that the name of the Emperor of Germany was substituted for that of the Emperor of All the Russias.

With regard to the last ten counts Lord Coleridge, C.J., stated a case for the opinion of this Court, as follows:—

Johann Most was tried before me at the Central Criminal Court on the 25th of May.

The ten last counts of the indictment charged the prisoner with offending against 24 & 25 Vict. c. 100, s. 4. The subject matter of all the counts was the same; the same publication which was treated as a common law libel in the first two counts, was treated as an offence against the statute in the remaining ten. It was an article written in German in a newspaper written entirely in that language, but published weekly in London, and enjoying an average circulation of 1200 copies. The prisoner was proved to be the editor and publisher of the paper, several copies of the paper were proved to have been bought at his house, and some copies of a print of the article in question were actually sold by the prisoner himself to one of the witnesses called on behalf of the Crown. It is not necessary to set out the article at length, but it contained amongst others the following passages:—

"Like a thunderclap it penetrated into princely palaces where dwell those crime beladen abortions of every profligacy, who long since have earned a similar fate a thousand fold. . . . .

"Nay, just in the most recent period they whispered with gratification in each other's ears that all danger was over, because the most energetic of all tyrant haters the 'Russian Nihilists' had been successfully terminated, to the last member.

"Then comes such a hit.

"William, ere while canister shot Prince of Prussia, the new

Protestant Pope and Soldier, Emperor of Germany, got convulsions in due form from excitement. Like things happened at other Courts. . . . . .

"At the same time they all know that every success has the wonderful power not only of instilling respect, but also of inciting to imitation. There they simply tremble then from Constantinople to Washington for their long since forfeited heads. . . . . .

"When in many countries old women only, and little children yet limp about the political stage with tears in their eyes with the most loathsome fear in their bosoms of the castigating rod of the State night watchman, now, when real heroes have become so scarce, such a Brutus deed has the same effect on better natures as a refreshing storm. . . . . .

"To be sure it will happen once again that here and there even Socialists start up who, without that any one asks them, assert that they for their part abominate regicide, because such an one after all does no good, and because they are combating not persons but institutions.

"This sophistry is so gross that it may be confuted in a single sentence. It is clear, namely, even to a mere political tyro, that State and social institutions cannot be got rid of until one has overcome the persons who wish to maintain the same. With mere philosophy you cannot so much as drive a sparrow from a cherry-tree any more than bees are rid of their drones by simple humming.

"On the other hand it is altogether false that the destruction of a prince is entirely without value, because a substitute appointed beforehand takes his place.

"What one might in any case complain of that is only the rarity of so-called tyrannicide. If only a single crowned wretch were disposed of every month, in a short time it should afford no one gratification henceforward still to play the monarch. . . .

"But, it is said, 'Will the successor of the smashed one do any better than he did.' We know it not. But this we do know, that the same can hardly be permitted to reign long if he only steps in his father's footsteps. . . .

"Meanwhile, be this as it may, the throw was good; and we hope that it was not the last.

"May the bold deed, which, we repeat it, has our full sympathy, inspire revolutionists far and wide with fresh courage."

The 4th section of the 24 & 25 Vict. c. 100, is as follows:—

"All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not more than ten and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour." The ten counts framed upon this section all charged the prisoner with having "encouraged," or "endeavoured to persuade" persons to "murder other persons," some named and others not named, who were in all cases not subjects of her Majesty, nor within the Queen's dominions.

The evidence in support of these counts was the same as that in support of the first and second counts; and the only encouragement and endeavour to persuade proved was the publication of the libel.

I directed the jury that if they thought that by the publication of the article the defendant did intend to and did encourage or endeavour to persuade any person to murder any other person, whether a subject of her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find the prisoner guilty upon the last ten counts, or such of them as they thought the evidence supported. The jury convicted the prisoner upon all the ten counts, and there was abundant evidence to justify them if my direction was correct.

Entertaining, however, some doubt as to the correctness of my direction, I deferred sentencing the prisoner, and I have now to request the opinion of the Court of Criminal Appeal whether such direction was correct in point of law or not. If the Court of

Appeal thinks the direction correct, the conviction on those ten counts is to be affirmed; if otherwise, the conviction on those ten counts is to be quashed.

A. M. Sullivan, for the prisoner. This is a prosecution for the publication of a newspaper article, not as a seditious or scandalous libel so far as the last ten counts are concerned, but as affecting an actual personal proposal or transaction between the prisoner and other persons. There was no evidence of any personal communication between the prisoner and the persons he is alleged to have encouraged to murder the sovereigns and rulers of Europe. The statute contemplates some personal communication between the parties, something more than the mere publication of a seditious or scandalous libel. There is nothing here in the nature of a personal proposal to any defined person, no effect produced or attempted upon the mind of a defined person. There was no evidence for the jury of an offence within the 4th section of the statute 24 & 25 Vict. c. 100. The case of *Reg.* v. *Peltier* (1) is an instance of a conviction for libel of the publisher of an article denouncing a foreign ruler, with whom this country was at peace, as a tyrant. That is the mode in which, under the two first counts, the present case should be dealt with. The case of *Reg.* v. *Vint* (2) is an example to the same effect. The object and purposes of the section under which this conviction is may be best ascertained by tracing the history of it through the previous statutes. It is taken from an Act passed for Ireland in 1829 (10 Geo. 4, c. 34). The Irish Act of 1829 adopted it without alteration from the Irish Act of 1798 (38 Geo. 3, c. 57), whilst the Act of 1798 adopted it, with an addition from the Irish Act of 1796 (36 Geo. 3, c. 27). The Irish Act, then, of 1796 was the source. It is entitled "An Act to make conspiracy to murder felony without benefit of clergy." The enacting part, so far as material, is, "All persons who shall by due course of law be convicted of conspiring, confederating, or agreeing to murder any person, shall be, and be adjudged felonious." In 1798 the next Irish Conspiracy Act was passed, intituled, "An Act to amend an Act passed in the 36th year of his present Majesty, intituled an Act to make conspiracy to murder felony without benefit of clergy," in which the words used are almost identical with those of 24 & 25 Vict. c. 100, s. 4. This historical retrospect strengthens the contention that the statute is aimed not at libels, but attempted conspiracies and conspiracies of a particular kind. The Acts were passed to punish Irish people who were said to be going about soliciting others to join the confederacy to murder. The only prosecution, so far as appears, that has ever been attempted under the Act now in question was a case falling within the view now contended for of the Act—a case of *Reg.* v. *Fox.* (1) It was a personal proposal by Fox to Hoey to murder F. Kennedy. This article contained no proposal to a defined person to murder a defined person.

---

(1) State Trials, vol. xxviii. p. 530.

(2) State Trials, vol. xxvii. p. 627.

[LORD COLERIDGE, C.J., referred to *Gerhard* v. *Bates.* (2)]

Sir H. James, A.G. (with him *Sir Farrer Herschell, S.G., Poland,* and *A. L. Smith*), for the prosecution. The question is whether there was evidence fit for the consideration of the jury of an offence within the statute. The argument on behalf of the prisoner must go to the extent that if the incitement to murder be an incitement generally to murder an individual, it does not, and cannot come within the statute; that directly a public and general libel is proved, punishment for libel alone can be inflicted, that incitement to a number of individuals to murder another is no incitement to any of such individuals considered separately. The propositions will not hold good for a moment if the statute be looked at. It is perfectly unambiguous, and the light of history is not needed to read it. It is a declaration of the common law, it always was a crime to incite to murder or to any other crime. The learned author of Russell on Crimes correctly states this, vol. i. 5th ed. p. 907. If the prisoner had gone to A. B., and by word of mouth repeated to him this article, it would, beyond all question, have been evidence for the jury of an offence within the section, so if he had sent specially to A. B., so too, it is submitted, when it is sent to the public in general, to the subscribers in particular, and to the witness called. It is clear that an orator addressing a crowd addresses the individuals of which that crowd is composed.

---

(1) 19 W. R. 109.

(2) 2 E. & B. 476; 22 L. J. (Q.B.) 364.

17 Jan 1698

LORD COLERIDGE, C.J. I am of opinion that this conviction should be affirmed. The question arises upon s. 4 of 24 & 25 Vict. c. 100, which enacts that all persons who shall, or any one who shall, I leave out the unnecessary words, encourage, or who shall endeavour to persuade any person to murder any other person, whether a subject of the Queen, or within the Queen's dominions, or not, shall be guilty of a misdemeanour. Now the doubt that arose in my mind was, whether the words of this section were satisfied by publication broadcast of that which, if directed ore tenus to a particular individual, or ore tenus to a great number of individuals, or by writing to a particular individual, or a great number of individuals, would undoubtedly have been within the words of the section. On consideration, I think that doubt was not well founded; indeed, all doubt has been entirely cleared away by the argument which I have heard this morning. I do not think it necessary to pursue the inquiry, however interesting it may be, as to the history of this clause. It is said that the words are copied from the Irish Statutes of 1796 and 1798 (36 Geo. 3, c. 27; 38 Geo. 3, c. 57). It may very well be that they are, but, as has been truly observed, we have not to do with the history of the words, unless the words in the statute are doubtful, and require historical investigation to explain them. If the words are really and fairly doubtful, then, according to well-known legal principles, and principles of common sense, historical investigation may be used for the purpose of clearing away the doubt which the phraseology of the statute creates. But upon looking at these words, I think there is no such doubt created by the phraseology. We have to deal here with a publication proved by the evidence at the trial to have been written by the defendant, to have been printed by the defendant, that is, he ordered and paid for the printing of it, sold by the defendant, called by the defendant his article, and intended, as the jury have found, and most reasonably found, to be read by the twelve hundred or more persons who were the subscribers to, or the purchasers of, the *Freiheit* newspaper; and, further, one which the jury have found, and I am of opinion have quite rightly found, to be naturally and reasonably intended to incite and encourage, or to endeavour to persuade persons who should

1881

THE QUEEN v. MOST.

read that article to the murder either of the Emperor Alexander, or the Emperor William, or, in the alternative, the crowned and uncrowned heads of states, as it is expressed in one part of the article, from Constantinople to Washington. The question, therefore, simply is on those facts which are undisputed and with regard to which the jury have pronounced their opinion—do those facts bring it within these words? I am of opinion they clearly do. An endeavour to persuade or an encouragement is none the less an endeavour to persuade or an encouragement, because the person who so encourages or endeavours to persuade does not in the particular act of encouragement or persuasion personally address the number of people, the one or more persons, whom the address which contains the encouragement or the endeavour to persuade reaches. The argument has been well put, that an orator who makes a speech to two thousand people, does not address it to any one individual amongst those two thousand; it is addressed to the number. It is endeavouring to persuade the whole number, or large portions of that number, and if a particular individual amongst that number addressed by the orator is persuaded, or listens to it and is encouraged, it is plain that the words of this statute are complied with; because according to well-known principles of law the person who addresses those words to a number of persons must be taken to address them to the persons who, he knows, hear them, who he knows will understand them in a particular way, do understand them in that particular way, and do act upon them. For that purpose the case which was suggested by my Brother Williams, and was mentioned by me in the course of this argument the case of *Gerhard* v. *Bates* (1), is an authority. There are authorities to be found elsewhere to the same effect, that a circular addressed to the public, containing false statements, reaching one of the public, not as an individual picked out, but as one of the public, who is influenced by the statement in that circular to his disadvantage, and who is injured by them, may afford good ground for a personal action for damages occasioned by the statements in that circular against

---

(1) 2 E. & B. 476; 22 L. J. (Q.B.) 364; see *Peek* v. *Gurney*, Law Rep. 6 H. L. 377, 397.

1881

THE QUEEN v. MOST.

the person who has issued it to the public. The reason being that the recipient of the circular is one amongst the number of persons to whom it is issued, and he has been injured by the statements contained in it. (1) It seems to me that this is not the less an endeavour to persuade, or an encouragement to murder, either named individuals, or unnamed individuals, because it is under another aspect of the law a seditious and scandalous libel. On the whole, I am clearly of opinion, on the words of the statute and upon the authorities which have been cited, that the direction given at the trial is correct, and the conviction right and proper to be affirmed.

Grove, J. I am of the same opinion. The words of the Act, so far as they are material to this case are, "Whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanour," &c. I think there can be no doubt that those words taken alone, for reasons which I will presently give, apply, at all events personally, to more than one particular person. I do not think it would be argued that if a person instead of encouraging or endeavouring to persuade one person, endeavoured to persuade two persons or three persons, that would not be within the Act, because in endeavouring to persuade two or three persons he endeavours to persuade each of those two or three persons. Then, to go a step further, supposing he addresses eight or ten persons, and says: Now, I recommend any one of you who has the courage to do it, to murder so-and-so, and you will gain so and so by it, or uses other words either by way of argument or by way of promise to induce some one or more of those persons to murder another; surely that would be encouraging a person or persons—that is, each and every one of those persons—to murder. Then supposing it is not done by word of mouth, supposing a person writes a letter to an individual person, can it be said that that is not wholly within the words of this section? It appears to me it is absolutely within them. It is a direct encouragement to a person to murder. Then if he goes further, and instead of writing one letter, he writes ten or twenty letters, and distributes them to persons whom he thinks they may have an effect upon, or the first twenty who come, does not he then encourage each of those persons to commit a murder? Then, to go a step further, if he prints a circular of the same character as a letter, and hands that to twenty or more than twenty persons, is not that an encouragement to every one of those twenty persons to commit a murder? Does he lessen the offence by increasing the number of persons to whom he publishes or transmits this encouragement? Then, can it be said that the printing of a paper and circulating it to a definite body of subscribers, as was done here, or to all the world does? It is beyond my comprehension to see that that can alter the fact at all. It seems to me first, it is clearly within the words of the statute, and, secondly, that so far from extenuating—I do not mean in the sense of punishment, but diluting the offence—it increases it, because he not only endeavours to persuade a person to commit the offence, but a considerable number of different persons, each of whom is "a person." It appears to me, therefore, that it is literally and clearly within the words of the statute, which are "persuade any person," and it does not the less do that because it persuades, or endeavours to persuade, or encourages separately, a considerable number of persons. Then it is said that this section is to some extent the same, the words are almost the same, as the previous Irish Act of 38 Geo. 3, c. 57, which was an addition to or an amendment of a previous Act relating to conspiracies, and there is no doubt that this Act of 38 Geo. 3, does primarily by the preamble, appear to relate to conspiracies, because, after reciting the previous Irish Act of 36 Geo. 3, c. 27, whereby it was enacted that persons who should by course of law be convicted of conspiracy, confederating, or agreeing to murder a person, should be adjudged felons, it goes on to a second recital: "And whereas the said recited Act hath been found ineffectual for the punishment of the crimes of proposing to, soliciting, and persuading others to enter into and engage in such conspiracies; be it therefore enacted, that any person or persons who shall propose to, solicit, encourage, persuade, or endeavour to encourage or persuade, any person or persons to murder any person, and shall be thereof by due course of law convicted," &c. Now, there the word "conspiracy" does not occur, although it occurs in the preamble. Then it is argued that we are not to hold that the statute applies, unless there is a conspiracy, that is unless there are two minds brought to bear on the subject; but the statute does not so state. The ineffectual character of the previous statute is recited, and, in order to remedy its defects, the statute of which I am speaking, is expressed to be enacted. But I do not require in truth to inquire into the meaning of the Irish statute; because the words of the statute on which the conviction went are perfectly clear. There is no such recital therein as the second recital I have alluded to, but, after having dealt with the question of a conspiracy clearly in one clause, it goes on, "and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanour." There the Act severs and contradistinguishes, if I may say so, the two offences, the conspiring on the one hand, and the encouraging or endeavouring to persuade on the other hand. The law has said no doubt that in construing an Act of Parliament, where the words are ambiguous, you may look to the previous statute to see the meaning, and to see what the object sought is, and to fairly construe; but here not only is there no ambiguity, but, to my mind, we are clearly told what the statute intends. Then as to evidence. There is ample evidence here, not only of circulation to a number of persons, each of whom might be affected, but there is evidence in this case that one person was actually proved to have received the publication, and he might fairly be said to be "a person" just as much as if a letter containing the article had been handed to him for his perusal. I do not think proof of such receipt by a particular person necessary, but if it be necessary, there is evidence of it. Therefore there was ample evidence to support the conviction, the direction was sufficient, and there is nothing here to enable me to say that the conviction should be quashed.

---

(1) See *Scott* v. *Dixon*, 29 L. J. (Ex.) 62, n. and *Peek* v. *Gurney*, supra.

DENMAN, J. The sole question in this case is whether there was, upon the facts which are here stated, evidence to go to the jury that the defendant was brought within s. 4 of 24 & 25 Vict. c. 100. And upon this point it was said for the defendant that it was not made out that he had encouraged or endeavoured to persuade any person to murder any other person. With regard to murdering any other person, that point was not reserved. I think there was nothing to reserve about it, because I should draw the same conclusion which the jury did from the document itself, that it did contain an encouragement or an endeavour to persuade to murder, the particular persons whose names are mentioned in it. But it is out of the case, and the only question is whether the words "any person" are met by the evidence in this case. Now, I must own that if that question had been for the first time raised before me, as it was before my Lord upon the trial, my impression is strong that, looking at the importance of the case, and looking at the fact of the absence of any authority upon it in our Courts, or bearing upon it in our Courts, I should, as my Lord did, have thought it a proper case to reserve for the consideration of the Court of Criminal Appeal, and I am glad he did so; but the question having been reserved, we have to consider whether there was here evidence to meet that part of the case. I think there was. The contention was that the statute did not intend to meet such a case, that the statute did not intend to meet the case of a libel of this character, circulated, as libels are circulated, simply by the publication of a paper, and sending it to the subscribers, or allowing it to be circulated amongst the population. I agree with my Lord entirely, and I am glad that he now feels that there is no doubt about it, and that though this may be a mere publication of a libel, still if it is the publication of a libel of this character, and the libel does in itself amount to an endeavour to persuade all persons to whom it is sent to commit a murder, nevertheless it is doing an act intended to be legislated against by this clause, making it a misdemeanour of another character—a misdemeanour punishable by a more severe punishment than the ordinary circulation of a libel of that character would be. The statute was passed for the very purpose, I think, of rendering it a more serious offence than the common law rendered it to do such an act as this. Now I need say no more than that I entirely agree with my Lord and my Brother Grove on that point, but I do wish to add this. The doubt which I should have felt probably, if it had come before me, was a doubt in accordance with Mr. Sullivan's argument whether the words "any person" might not mean some definite person. I should, however, have thought that if it had been made out that the libel had been circulated to a certain set of persons whose identity was easily ascertained, except only that their names were unknown, the clause would have been satisfied even if it meant some definite person. But I do not think that is the meaning. I think the circulation to the world, to multitudes of persons wholly undefined, and to whom it would come, would be sufficient, but what I wish to add is this, that even if the other construction were the true one, I should have been prepared to support the conviction on this ground—that many of these persons were, in that sense, definite persons. They were known subscribers in large numbers to this newspaper, and the man who edited the newspaper, the man who wrote the article, the man who sold the newspaper and caused it to be distributed, did know that that newspaper would, in the ordinary course, come to its regular subscribers at all events, whether it went to a larger number of persons, or whether it did not. Therefore, supposing it were necessary that the persons unknown should be in this case definite persons, ascertainable persons, persons who might be ascertained by inquiry, although unknown to the jurors at the time of their finding, I should have thought that in that sense the indictment was supported by the evidence.

HUDDLESTON, B. The question for our consideration, submitted to us by the Lord Chief Justice, is whether his direction was correct in point of law, and that direction is this: he told the jury that if they thought that by the publication of the article the defendant did intend to, and did, encourage or endeavour to persuade any person to murder any other person, whether the subject of her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavour to persuade was the natural and reasonable effect of the article, they should find the prisoner guilty. Now I do not entertain the slightest doubt that that was really the only question which could be left to the jury, and that the evidence was ample to warrant their finding. The charge is founded directly on the words of the statute, and if you come to look at the words of the statute, the distinction which Mr. Sullivan has endeavoured to draw with reference to conspiracy, really does not arise; because the section of the statute contemplates two classes of cases, one where there is a conspiracy, and another where there is individual action. As regards the second class, it is remarkable to see the words which the legislature have used for the purpose of pointing out the act which makes the party liable. The largest words possible have been used—"solicit"—that is defined to be, to importune, to entreat, to implore, to ask, to attempt to try to obtain; "encourage," which is to intimate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident; "persuade," which is to bring to any particular opinion, to influence by argument or expostulation, to inculcate by argument; "endeavour," and then, as if there might be some class of cases that would not come within those words, the remarkable words are used, "or shall propose to," that is to say, make merely a bare proposition, an offer for consideration It is to be a misdemeanour of a highly criminal character to solicit, to encourage, to persuade, or even to propose to any person to kill any other person, whether one of her Majesty's subjects or not. Mr. Sullivan has argued that you must have an immediate connection between the proposer, the solicitor or the encourager, and the person who is solicited, encouraged, persuaded, or proposed to, and that it is not sufficient to solicit generally, that you must solicit some person in particular. What was the intention of this Act? The intention was to declare the law and to protect people abroad from the attempts of regicides of this description, and therefore the largest possible words are used. It shall be criminal—not to persuade an individual, but to persuade "any person," that is to say, the public—crowds who may hear it if it is an oration, or who may read it if in a newspaper. I have been furnished from the bar with a case, which is certainly not inapplicable to the present one. There was a question of a disputed marriage, and the father, who was interested in the marriage, put an advertisement in the newspapers offering a reward of a hundred pounds if any person could come and give evidence of that marriage. It was suggested that the object was to render impure the sources of justice, to bribe some people to give improper evidence, and the party was brought up for contempt before Lord Chancellor Parker, but it was urged on his behalf that nothing had been done in consequence of the advertisement. No witnesses had come. But the Lord Chancellor said: "It does not appear that some person would not come in if this were not discouraged; however, the person moved against has done his part, and if not successful is still not the less criminal." The counsel objects that it is not to any particular person. "It is equally criminal when the offer is to any, for to any is to every particular person. The advertisement will come to all persons, to rogues as well as honest men, and it is a strange way of arguing to say that offering a reward to one witness is criminal, but that offering it to more than one is not so. Surely it is more criminal, as it may corrupt more." (1)

If you hold an offer out to the public—an invitation to come in and give perjured evidence—that is as much a criminal act as to request an individual to do so. Just so it is here criminal to publish to the whole world, or declare to the whole world, that the individual rejoices in regicide and recommends others to follow his example, and trusts that the time is not long absent when once a month kings may fall. This article was an encouragement to the public—a solicitation and encouragement to any person who chooses to adopt it, and comes within the meaning of the Act. I am perfectly satisfied with the conviction, and think it was right.

WATKIN WILLIAMS, J. I am of the same opinion. The jury have found the defendant guilty, and upon the narrow question of law which has been reserved for the consideration of this Court, it seems to me the conviction ought not to be interfered with.

Conviction affirmed.

Solicitor for the prosecution: *The Solicitor to the Treasury.*

Solicitor for prisoner: *H. E. Kisbey.*

C. D.

---

(1) *Pool* v. *Sacheverel*, 1 P. Wms. 675; see *Plating Co.* v. *Farquharson*, 17 Ch. D. 49.

1881
June 28.

PEARSON, APPELLANT; HEYS, RESPONDENT.

Bastardy—Order made since 35 *&* 36 *Vict. c.* 65, *for Payment until the Child attains the age of Sixteen or the Mother marries—Discretion of Justices to order Payment for less than Maximum Period.*

11 QBD 76

The justices have a discretion under 35 & 36 Vict. c. 65, to order weekly payments for the maintenance of a bastard child for a less period than the maximum period given by s. 5 of the Act, and consequently, where the justices made an order for weekly payments until the child attained the age of sixteen or the mother married, such order was held not to be in force after the marriage of the mother.

CASE stated by justices.

The facts, so far as material to the point here reported, were as follows:—

On the 16th of June, 1873, subsequently to the passing of 35 & 36 Vict. c. 65, on an affiliation summons taken out by the respondent, then a single woman, justices in petty sessions made an order on the appellant, the putative father, for payment of 4*s.* a week until the child should arrive at the age of sixteen years, or until the mother should marry.

The payments under the order were regularly made until the 23rd of March, 1879. On that date and before the child arrived at the age of sixteen years the mother married. The appellant then refused to continue the payments. A summons was taken out by the mother against the appellant for non-payment of certain weekly sums alleged to have become due under the order since the marriage of the mother. The justices made an order against the appellant for payment of such sums, subject to a case raising the question whether the words in the affiliation order, by virtue of which the payments were to cease on the marriage of the mother, could be treated as surplusage, or whether they entirely vitiated the order.

French, for the appellant. The Court called on

MacLeod, for the respondent. The magistrates had no discretion under the statute 35 & 36 Vict. c. 65, to make an order for a less period of time than thirteen years, though they might under s. 5 extend the period to sixteen years. The 4th section simply provides that they may make the order, but if they make it the statute provides for the period of its duration, viz. thirteen years, except in cases where the justices extend the period to sixteen years. The Act expressly repeals 7 & 8 Vict. c. 101, s. 5, which provided that no order of affiliation should be in force after the marriage of the mother, and, therefore, by implication, it follows that the magistrates were not empowered to limit the order in the way they have. The limitation of the order must be treated as surplusage and rejected, and the order treated simply as an order for payment for the period provided for by the statute. [He cited *Sotheron* v. *Scott*. (1)]

French, for the appellant, in reply. Notwithstanding the repeal of the provision which avoided the order on the marriage of the mother, there is nothing in the Act to prevent the magistrates in their discretion from making the order in the first instance subject to this limitation—if in their opinion the circumstances of the particular case render it expedient. In *Stacey* v. *Lintell* (2) Lush, J., said, " But I think the only effect of the omission is to prevent an order duly made from becoming wholly void on the marriage of the mother, and to leave it in the discretion of the justices to allow the order to continue until the child has reached the prescribed age."

POLLOCK, B. The question is whether the magistrates had power to limit the order in the way they did. That depends on the language of the 4th and 5th sections of the Bastardy Act, 1872 (35 & 36 Vict. c. 65.) The 4th section provides that the justices may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child, or to any person who may be appointed to have the custody of such child under the provisions of the said recited Act, of a sum of money weekly not exceeding 5*s*. a week for the maintenance, &c., of the child. The 5th section provides that no such order shall be of any force or validity after the child has attained the age of thirteen years or after the death of such child, provided that the justices may in the order direct that the payments to be made under it in respect of the child shall continue until the child attains the age of sixteen years, in which case the order shall be in force until that period. That shews that the extreme limit of time for which the order can be made is sixteen years, but there is nothing to shew that the justices may not make the order for such lesser period as under all the circumstances of the case they may think proper. Cases are conceivable in which it might not be just or expedient to make an order in favour of the woman for the full period, for instance, as was suggested by my Brother Manisty during the argument, the woman might be coming into property amply sufficient to enable her to maintain the child before the expiration of such period. It is therefore reasonable that the justices should have a discretion to lessen the period for which the payment is to be made, and I do not find any words inconsistent with their having such a discretion. It seems to me, therefore, that the affiliation order is good in its entirety, and the limitation cannot be treated as surplusage. The order appealed against must be quashed.

---

(1) 6 Q. B. D. 518.

(2) 4 Q. B. D. 291.

Manisty, J. I am of the same opinion. I cannot help thinking it expedient that the justices should have a discretion to make an order for less than the extreme period. There are no doubt words prescribing a maximum period, but there are no words imposing any other limitation on the justices' discretion, provided that such maximum is not exceeded. According to the law as it stood in the Act of 1844 no order was of force after the marriage of the mother. The legislature in 1872 altered that state of things, and under the Act of that year an affiliation order might be enforced after the marriage of the woman as long as the child was under thirteen or sixteen years of age, as the case might be. The words of the 4th section of 35 & 36 Vict. c. 65, are very wide. The justices are to have regard to all the circumstances of the case, and why, when, having regard to the circumstances of the particular case, it seems to them just and expedient, should they not order the payment for a period less than thirteen years? I thought at first that this construction might work injustice if at the expiration of such time the mother was still unable to maintain the child. But the 4th section provides that the mother may take out the summons before or within twelve months from the birth of the child, or at any time thereafter if the father of such child has within twelve months next after the birth of the child paid money for its maintenance, so when, as in this case, the order is made and money paid under it within twelve months from the birth of the child, the mother at the end of the period mentioned in the order may, it would seem, come again for another order. It seems to me, therefore, that this order should be quashed.

Order quashed.

Solicitors for appellant: *Shaw & Tremellen, for Forshaw & Parker.*

Solicitors for respondent: *Clark, Woodcock, & Ryland, for J. O. Thompson.*

E. L.

1881
May 27.

HARDY, APPELLANT; ATHERTON, RESPONDENT.

Bastardy—Order of Maintenance—Marriage of Mother after making of Order—Ability of Husband to maintain bastard Child—Liability of putative Father.

9 QBD 239
241, 2, 3

An order obtained by a single woman for the maintenance of a bastard child can be enforced against the putative father after the marriage of the mother although her husband is able to maintain the child.

CASE stated by justices of Lancashire under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

On the 25th of August, 1877, the appellant, then Hannah Vernon, a single woman, obtained a bastardy order, whereby the respondent was adjudged to be the putative father of her bastard child, and ordered to pay to her, "the mother of the child, so long as she shall live, or to the person who might be appointed to have the custody of such child, under 7 & 8 Vict. c. 101, the sum of 5*s.* per week for the maintenance and education of the said child until it should attain the age of sixteen years or should die."

On the 27th of November, 1880, an information and complaint to enforce payment of 4*l.* 5*s.* arrears due under the order was heard before the justices, when it appeared that the child was still living and that the arrears were due and owing, but that since the making of the order, viz., on the 22nd of March, 1880, the appellant had intermarried with James Hardy, and was then, and still was, living with him as his wife. It was admitted that James Hardy was able to maintain the child.

It was contended that the appellant was not entitled to the benefit of the order so long as her husband was able to maintain the child, the sole and responsible care of it having devolved upon him as her husband under 4 & 5 Wm. 4, c. 76, s. 57.

Lang v. *Spicer* (1) and *Stacey* v. *Lintell* (2) were cited.

It was contended for the appellant that those cases did not apply. Here the order had been made while she was single.

(1) 1 M. & W. 129.

(2) 4 Q. B. D. 291.

The justices being of opinion that as the appellant had married, her husband was responsible for and capable of maintaining and educating the child, and that such order could not be enforced so long as the appellant was a married woman whose husband was capable of supporting her child, dismissed the information and complaint.

The question for the opinion of the Court was, whether the order could be legally enforced against the respondent by committal during such period as the appellant resided with her husband, and he was liable to maintain the child.

McClymont, for the appellant. The case is governed by *Sotheron* v. *Scott.* (1) The fact that the husband of the appellant was able to support the child does not make any distinction. The justices probably acted on *Stacey* v. *Lintell* (2), but there the mother had not obtained an affiliation order before her marriage.

Croome, for the respondent. The question is, whether this order can be enforced while the mother lives with her husband and he is able to maintain the child. In *Sotheron* v. *Scott* (1) there was no evidence of his ability to do so. Here it is admitted. Up to the passing of 4 & 5 Wm. 4, c. 76, no one, unless under an affiliation order, was bound by statute to support a bastard child except the parish. Sect. 71 threw the liability on its mother, and s. 57 on her husband if she married. Under that Act the putative father was held no longer liable on an affiliation order during the marriage of the mother, at least while the husband was of ability to maintain the child: *Lang* v. *Spicer.* (3) That s. 57 is not repealed, and the case is still law.

The order now instead of being immediately for the relief of the parish is for that of the mother. By 7 & 8 Vict. c. 101, she was first empowered to obtain an order, which, however, became absolutely void on her marriage. That was thought to be a hardship, and the provision in s. 5 for cessation of the order on marriage of the mother was omitted from 35 & 36 Vict. c. 65, s. 3. But that omission only restores the law to the state it was in before 7 & 8 Vict. c. 101, and the order becomes suspended only, and not

---

(1) 6 Q. B. D. 518.

(2) 4 Q. B. D. 291.

(3) 1 M. & W. 129.

1881

HARDY v. ATHERTON.

void, on the marriage of the mother. There is no provision in the new Act for enforcement of the order by the mother after marriage.

Cur. adv. vult.

May 27. HUDDLESTON, B. The object of the law originally was to relieve the parish from the burden of maintaining illegitimate children, subsequently the legislature gave the justices power, under 7 & 8 Vict. c. 101, c. 5, to make an order in favour of the mother of the illegitimate child. By the Bastardy Law Amendment Act, 1873, 36 Vict. c. 9, s. 5, guardians of a union or parish may recover the costs of keep of a bastard child, in certain cases where it has become chargeable to an union or parish.

The 3rd and 4th sections of the Act of the previous year, the Bastardy Laws Amendment Act, 1872, 35 & 36 Vict. c. 65, relate to the right of the mother to an order against the putative father, and it is under the last mentioned section that this order was made. The only limitation as to when the payments shall cease is to be found in s. 5 of the same Act, which says that no order is to be enforced after the death of the child or after it has attained the age of thirteen years, or, if the justices so order, sixteen years. There was a provision introduced in the previous Act, 7 & 8 Vict. c. 101, s. 5, that no order should, except for the purpose of recovering money previously due under such order, be of any force "after the marriage of the mother of such child."

If that remained in force, the order would cease to have any effect after the marriage of the mother, but that part of the section was repealed by the Act of 1873. It is clear that the legislature had its attention called to the matter, and did not intend the liability of the father to cease on the marriage of the mother. It is worthy of remark also that, although various limitations are introduced into the order of the justices, there is no limitation with reference to the marriage of the mother. Under these circumstances, I have no doubt that the order is in force, although the mother marries again, and her husband has means to keep the child. In the case of *Sotheron* v. *Scott* (1) the point now before us was decided with one exception, viz., that the question of the ability of the husband to maintain the child was not introduced. I have consulted Field, J., who says that the report does not quite convey what he intended to say, which was that in view of the opinion of Lush, J. in *Stacey* v. *Lintell* (1), the question of the discretion of the justices upon hearing the summons against the putative father to take into account the means of the woman's husband, must be considered an open question, but he entertains no doubt on the matter. I think the justices have no such discretion as has been suggested, and that this appeal must be allowed.

---

(1) 6 Q. B. D. 518.

HAWKINS, J. Under the circumstances stated in this case, I am of opinion that the order can be legally enforced against the respondent. As between the parish and the husband, no doubt he is liable to maintain the child as a part of his family, under the 57th section of 4 & 5 Wm. 4, c. 76, and so long as he is of ability so to maintain it, the child cannot legally become chargeable upon the parish. On this ground upon the authority of *Lang* v. *Spicer* (1), it was contended on behalf of the respondent, that the order could not be enforced. Had the law remained at the present day as it was when that case was decided, it would have been an authority in point by which we should have been bound. Indeed, I for one, should without any authority have come to the same conclusion, for as the law then stood the putative father was only liable so long as the child was chargeable to the parish, which it would not be if it formed part of the family of a person able to maintain it without parish assistance. Orders at that period were only made in relief of the parish, and on the face of them it was so expressed. The 7 & 8 Vict. c. 101, however, repealed 4 & 5 Wm. 4, c. 76, and the earlier statutes so far as related to the orders upon putative fathers, and by ss. 2, 3, and 5, justices were empowered, on the application of any single woman who had been delivered of a bastard child, to make an order on the putative father for payment to her, the mother of the child, of a weekly sum, to be due and payable to her so long as she lives and is of sound mind and not in gaol, &c., &c. Provided always, that the order should not remain of any force or validity after the child attained the age of thirteen years, or after the marriage of the mother. By 35 & 36 Vict. c. 65, s. 2, these provisions and this proviso were expressly repealed, and by s. 4 power is given to justices to make an order on the putative father for payment to the mother of a weekly sum for the maintenance and education of the child till it arrives at the age of thirteen (or sixteen if specially ordered), and in s. 7 provision is made for making parish officers receivers under such orders in the event of the child becoming chargeable. There is no re-enactment of the proviso that the order shall become inoperative on the mother's marriage. The 36 Vict. c. 9, does not affect the present question. Since the repeal of the portions of the statute 4 & 5 Wm. 4, c. 76, above referred to, I find no ground for saying that the orders upon putative fathers are only enforceable by way of relief of the parish, and since the repeal of the proviso of 7 & 8 Vict. c. 101, s. 5, no ground for saying they are suspended or of no avail during the marriage of the mother. They are made payable generally to the mother, and the only limits to their force are those to which I have referred, viz., the child attaining thirteen (or sixteen in case of special order), or its death. The case of *Stacey* v. *Lintell* (1) was cited in support of the appellant's view, but that case only decides that when a woman is married and living with her husband, she can no longer be deemed a single woman having power to apply for an affiliation order under 35 & 36 Vict. c. 65. It is no authority for saying that an order already made on the application of a woman when single cannot be enforced after her marriage. The observations of Lush, J., just before the close of his judgment, though entitled to great respect, as everything which falls from that learned judge is, are not necessary to the decision of that case, and do not purport to be the result of deliberate reflection. It only remains for me to notice one other case, that of *Sotheron* v. *Scott* (2), by which it was decided that an order of affiliation was not necessarily revoked or suspended by the marriage of the mother, so far that case is strongly in favour of the appellant. In the report of the case Mr. Justice Field is said to have said, "It may or may not be the law that they" (the justices) "have a discretion, upon

---

(1) 4 Q. B. D. 291.

(1) 4 Q. B. D. 291.

(2) 6 Q. B. D. 518.

the hearing of a summons against the putative father to enforce payment, to take into account the means of the woman's husband, where these are shewn to be sufficient to maintain the child." I do not understand those remarks to be intended to intimate any hostile opinion to that which I have arrived at. In the result, I am of opinion that the order can be enforced notwithstanding the marriage of the appellant and the ability of her husband to support the child, which by compulsion of law he has taken as a member of his family. And I am glad that it is so, for common sense and common humanity tell me that the putative father ought not to be relieved from liability to contribute his share of the maintenance of his own offspring, at the expense of the man who has married the woman who had the misfortune to bear it; and who possibly may have a hard struggle to support the family of which he is legitimately the head, and to whom the contribution of him who ought to bear it towards the one foreign member of it may be of real importance.

I rejoice too to think that since the days of Queen Elizabeth, our laws have been so far humanized that a bastard child is no longer a mere thing to be shunned by an overseer,—whose existence is unrecognised until it becomes a pauper, and whose only legitimate home is a workhouse, that it is no longer permissible to punish its unfortunate mother with hard labour for a year, nor its father with a whipping at the cart's tail: see 18 Eliz. c. 3, and Dalton's Justices of the Peace, p. 34, but that even an illegitimate child may find itself a member of some honest family, and that the sole obligation now cast upon its parents is that each may be compelled to bear his and her own fair share of the maintenance and education of the unfortunate offspring of their common failing.

Case remitted to the justices.

Solicitors for appellant: *Horne, Hunter, & Birkett.*
Solicitors for respondent: *Norris, Allens, & Carter.*

J. R.

1881
July 4.

SUFFELL *v.* THE BANK OF ENGLAND.

Bank of England—Action on Note—Erasure of Number—Material Alteration.

44(55.33

In an action against the Bank of England for non-payment of notes payable to bearer issued by them, it appeared that the notes had been bonâ fide purchased by the plaintiff for value, but that they had been fraudulently obtained by the person from whom he purchased them, and that before they were in the custody of the plaintiff they had been altered, by erasing the numbers upon them and substituting others, with the object of preventing the notes from being traced :—

Held, by Lord Coleridge, C.J., that the alteration was not material in the sense of affecting the plaintiff's right of action on the notes, and that the defendants were liable.

Revd by Ct of appl 9 QBD 555 CA

Action by the plaintiff as the holder of Bank of England notes, ten of 20*l.* each and six of 50*l.* each, alleging that payment had been demanded of the defendants and refused.

At the trial before Lord Coleridge, C.J., at the Guildhall sittings in April, 1881, it appeared that the plaintiff, a banker and money-changer of Brussels, had bonâ fide and for value purchased the notes in question, but that they had been fraudulently obtained by the person from whom he received them. Payment of the notes had been stopped at the bank, and a notice issued specifying their numbers. It further appeared that when the plaintiff received the notes the numbers of some of them had been erased and other numbers substituted.

The jury having been discharged, the cause was reserved for further consideration, and was argued by

W. G. Harrison, Q.C., H. D. Jencken, and *C. H. Anderson,* for the plaintiff.

Sir J. Holker, Q.C., A. Cohen, Q.C., and *H. D. Greene,* for the defendants.

Cur. adv. vult.

July 4. Lord Coleridge, C.J. The short question in the case is whether the defendants can refuse to pay on some bank notes, undoubtedly issued by them, and which have come into the hands of the plaintiff as a bonâ fide purchaser of them for value without notice, upon the single ground that one of the figures in the numbers of the notes has been altered, no doubt fraudulently,

1881

SUFFELL
v.
BANK OF
ENGLAND.

and for the purpose, if possible, of preventing the notes from being traced. Other notes were procured from Payne, Smith, & Co., the bankers in London, by a forged cheque; these notes were changed at the Bank of England for the notes sued upon in this action, which notes were bought by the plaintiff, a banker at Brussels, in the ordinary way of his trade; and on them he sues the Bank of England, who refuse to pay.

The determination of the action depends upon the question whether the notes have been altered in a material particular; and this question is a question of law.

The leading authority on the subject is the well-known case of *Master* v. *Miller*. (1) There an unauthorized alteration in a bill of exchange, whereby the day of payment was accelerated, was held to avoid the instrument, even as against an innocent holder for value. The nature of the alteration, and therefore the original contract, being capable of proof, made no difference in the opinion of the judges. Mr. Justice Buller dissented, and I think was overruled rather than answered by the majority who decided the case. But so is the law; and there is no doubt that the breadth of the language both of Lord Kenyon and Eyre, C.J., taken literally, would cover this case.

But it has always been held that the alteration which vitiates an instrument must be a material alteration; i.e. must be one which alters or attempts to alter the character of the instrument itself, and which affects or may affect the contract which the instrument contains or is evidence of. It is not every physical alteration which will suffice. *Sanderson* v. *Symonds* (2) and *Aldous* v. *Cornwell* (3) are clear authorities to shew that an immaterial alteration will not do. My brother Lush in his excellent judgment in *Aldous* v. *Cornwell* (3) says that the decision in *Sanderson* v. *Symonds* (2) was confined by the judges to policies of insurance. There are expressions in the judgments of the Lord Chief Justice and of Park, J., which support his view—and the instrument in question was in fact a policy. But the language of the judges I think goes beyond this, and Richardson J., a very great and most accurate lawyer, does not in any way qualify the

(1) 4 T. R. 320; in error, 2 Hen. Bl. 141.

(2) 1 B. & B. 426.

(3) Law Rep. 3 Q. B. 573.

generality of his language. *Catton* v. *Simpson* (1) is to the same effect; and though that case was expressly overruled in *Gardner* v. *Walsh* (2), it was so, not on the ground that an immaterial alteration avoided the instrument, but that the alteration in *Catton* v. *Simpson* (1) was material.

In the sense in which the word "material" has been used in all the cases I have been able to refer to, of which *Master* v. *Miller* (3), *Burchfield* v. *Moore* (4), and *Gardner* v. *Walsh* (2), are only examples, the alteration has been held material because it varied or attempted to vary the contract. Here the alteration is nothing of the sort. It is material in a popular sense, because it interposes some difficulty in the way of the Bank of England detecting or helping to detect the original fraud, by making it harder to trace the notes or to stop them at the bank. But this is a wholly collateral matter. An alteration material in this popular and collateral sense has never yet been held to vitiate an instrument in the hands of an innocent holder; and Sir John Holker admitted this in fact, but urged that the generality of the words in *Master* v. *Miller* (3) was wide enough to take in this case, and that it was wise so to extend them. I do not think so, and I must decline the invitation. It needed a statute to make the crossing of a cheque a material part of it.

It was argued that such an alteration as this would be within the mischief and the words of 24 & 25 Vict. c. 98, ss. 12, 17, sections in a criminal statute, dealing with the forgery of bank notes, and with the making of plates from which the whole or any parts of bank notes may be unlawfully printed. It may be so, and as at present advised I think it is. But these sections were passed diverso intuitu, and I think have no bearing on the present question.

I give judgment for the plaintiff with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Argles, Rand Bailey, & Argles.*
Solicitors for defendants: *Freshfields & Williams.*

---

(1) 8 A. & E. 136.
(2) 5 E. & B. 83. 1 Jur NS 528
(3) 4 T. R. 320; in error, 2 Hen. Bl. 141.
(4) 3 E. & B. 683. 18 Jur 727

A. P. S.

[IN THE COURT OF APPEAL.]

1881
April 12.

Ex parte GREEN.

Ecclesiastical Law—Public Worship Act, 1874 (37 & 38 *Vict. c.* 85), *s.* 9—5 *Eliz. c.* 23, *s.* 11—53 *Geo.* 3, *c.* 127, *s.* 1—2 & 3 *Wm.* 4, *c.* 93, *s.* 1—*Judge of Provincial Chancery of York—Request to hear Matter at Westminster—Power to sit out of his Province—Writ de contumace capiendo—County Palatine of Lancaster.*

22 Ch. D. 319
8 P.D. 82

A representation having been made against a clergyman, rector of a parish within the County Palatine of Lancaster, in the province of York, under the Public Worship Act, 1874, for breaches of ecclesiastical law, the bishop sent the matter to the archbishop, who sent it to the judge of the Provincial Courts of Canterbury and York, requiring him to hear it at London or Westminster, or within the province of York, or diocese of M. The judge elected to hear it at Westminster, and accordingly having there heard the case, issued a monition warning the defendant to abstain from the practices complained of. The defendant still continuing the practices, the judge, still sitting in the same place, issued an inhibition inhibiting him from performing divine service, and on his persisting in his disobedience pronounced him in contempt, and signified the contempt to the Chancery Division of the High Court, and sent a copy of the significavit by mittimus to the Chancery Court of the County Palatine of Lancaster. The Vice-Chancellor of the County Palatine sitting at Lincoln's Inn, having heard the matter argued before him, ordered the writ de contumace capiendo to issue, and it was accordingly issued out of the office of the Court of the County Palatine at Preston, and the defendant was arrested:—

Held, that the arrest was lawful, for first, the judge of the Provincial Court of York had jurisdiction while sitting at Westminster, not only to hear the representation and issue his monition, but to hear and adjudicate on all other matters incident to the case, and therefore the order to issue the writ of significavit was regular.

Secondly, the proceedings by which the writ de contumace capiendo was issued out of the Chancery Court of the County Palatine were in accordance with the Act 53 Geo. 3, c. 127, and the Act 5 Eliz. c. 23, and were regular.

Thirdly, there was no irregularity in the Vice-Chancellor of the County Palatine ordering the issue of the writ de contumace capiendo while sitting in Lincoln's Inn, as he was not acting in a judicial capacity.

Affirmed 6 App. Cas. 657 H.L.

THIS was an application on behalf of the Rev. Sydney Faithorne Green, rector of St. John, Miles Platting, Lancashire, then a prisoner in Lancaster gaol, for a writ of habeas corpus to bring him before the Court with a view to his discharge, on the ground of irregularities in the proceedings against him under which he was in custody.

In the month of November, 1878, a representation was made under the Public Worship Regulation Act, 1874, by W. Dean, W. Warrell, and J. H. Worrill, three parishioners of Miles Platting, to the Bishop of Manchester. The offences charged against Mr. Green principally related to the introduction of unauthorised ornaments into the church, and the use of unauthorized ceremonies and vestments in the administration of the Holy Communion. The parties having declined to submit to the directions of the bishop respecting the matter of the representation, the representation was transmitted by the bishop to the Archbishop of York.

On the 18th of February, 1879, the archbishop required Lord Penzance, on the part of the Provincial Court of York, to hear and determine the matter of the representation at any place in London or Westminster, or within the province of York, or within the diocese of Manchester, as he might think fit.

Lord Penzance accordingly heard the matter on the 10th of June, 1879, in his room at the House of Lords, at Westminster, and on the 27th of June issued a monition ordering Mr. Green to remove the ornaments, and to abstain from the practices complained of for the future.

Mr. Green having disregarded this monition, Lord Penzance issued an inhibition against him on the 16th of August, 1879, inhibiting him from performing any service in his church for three months. This order was made, like the monition, by Lord Penzance at Westminster, in the absence of Mr. Green, who declined to appear.

Mr. Green, however, still disregarded the order of the Court, and continued to perform the services as before, and on the 17th of August, 1880, he was served with a notice headed "In the Chancery Court of York, and in the representation of W. Dean, W. Warrell, and J. Worrill," that the Court, sitting in Lord Penzance's room at Westminster, would be moved on the 5th of August, 1880, to declare him guilty of contempt, and punish him accordingly. Mr. Green paid no attention to this notice, and eventually, on the 20th of November, 1880, the matter was heard at Westminster, and Mr. Green was pronounced contumacious.

On the 25th of November, 1880, Lord Penzance signified the contempt to the High Court of Justice, Chancery Division. A copy of the significavit was sent to the Chancellor of the County Palatine in Lancaster.

A motion was then made before the Vice-Chancellor of the County Palatine, sitting at his Chambers at Lincoln's Inn, asking that a writ de contumace capiendo might issue to the officers of the County Palatine to arrest the defendant. Mr. Green was served with notice of this motion, but did not appear. The Vice-Chancellor ordered the writ to issue, and on the 9th of March, 1881, the writ was issued at Lancaster, and on the 19th Mr. Green was arrested by the sheriff of the County Palatine and lodged in Lancaster gaol.

On the 6th of April, 1881, Mr. Green applied for a rule nisi for a habeas corpus to the Divisional Court of the Queen's Bench Division. The application was heard by Grove and Lindley, JJ.

Charles, Q.C. (*Poland,* and *Phillimore,* with him), in support of the motion, contended, first, that Lord Penzance, sitting at Westminster, had no jurisdiction to issue the significavit; secondly, that the subsequent proceedings were void, as the Vice-Chancellor of the County Palatine had no jurisdiction to issue a writ, the only authority to do so being in the Chancery Division of the High Court of Justice; and, lastly, that if he had authority to issue the writ, he could not do so at Lincoln's Inn.

Grove, J. In this case we are asked for a rule nisi for a habeas corpus to bring up the body of Mr. Green, who has been imprisoned for disobedience to a monition, in fact, for contempt of Court, and we have been asked to grant the rule upon three grounds. The first of these is that Lord Penzance had no jurisdiction, sitting at Westminster, to issue a significavit for the issue of a writ by the Court of Chancery, whether of the High Court or the County Palatine is for this purpose immaterial. It seems to me, however, that he had this jurisdiction. The argument was, that after going through certain matters in which Lord Penzance had original jurisdiction under the Public Worship Regulation Act (37 & 38 Vict. c. 85), he had no power to take further steps, except in the exercise of such powers as might have been exercised by the jurisdictions to which he succeeded, and that he could only exercise those powers within the local jurisdiction of those judges whom he succeeded, so that this process of significavit being issued in London and not in the County Palatine of Lancaster was without jurisdiction. I do not think this is correct, for I cannot read s. 7 otherwise than as providing for what would be an inconvenience if the judge were obliged to transfer himself, according to the progress of the case before him, from London to York. The words of s. 7, saying that proceedings taken before the judge in relation to matters arising within the Province of York, shall be deemed to be taken in the Chancery Court of York, seem to me to be inserted to meet this very inconvenience. The use of the word "deemed" to my mind, conveys the meaning that, although the proceedings are not taken locally in the Chancery Court of York, they are to be as though this had been the case, if in fact they are taken before the judge within the limits of the jurisdiction given him by the Act. It is said that in the Court of Appeal, in *Dale and Enraght's Cases* (1), James, L.J., applied these words to other portions of the proceedings, but there is nothing which fell from that learned judge to shew that the words are not to apply to this writ as to other steps in the proceedings. It is a thoroughly well known rule of interpretation that we should read a statute in its ordinary and grammatical sense, unless so doing will lead to a manifest absurdity or inconsistency. So far from that being the case here it is just the contrary, for this interpretation removes the absurdity that the judge should go to and fro, and that the place where he can exercise his general jurisdiction should not be the place at which he can also exercise what I may term his local jurisdiction.

The second point is, that the Vice-Chancellor of the Duchy of Lancaster had no authority to issue a writ de contumace capiendo. It is said that this writ is a mere substitution by 53 Geo. 3, c. 127, for the antecedent writ de excommunicato capiendo. It is said that the words of the statute must be strictly followed, and that the provisions of 5 Eliz. c. 23, taken with the schedule of 53 Geo. 3, c. 127, which gives the form to be used, shew that the issue of the writ is confined to the Court of Chancery, that is now the Chancery Division in London, and does not apply to the

---

(1) 6 Q. B. D. 376.

County Palatine or other jurisdiction, where the Queen has jurisdiction under another title from that used in the form and in another mode. It does not appear to me that this is so. The 1st section of 53 Geo. 3, c. 127, declares that all rules and regulations not thereby altered, then by law applying to the writ de excommunicato capiendo, and particularly the provisions of 5 Eliz. c. 23, shall extend and apply to the writ de contumace capiendo, and all the proceedings thereon, as if the same were particularly re-enacted. That comprehends all proceedings, both antecedent and following. They are rules and regulations applying to the issue of the writ, so that the provisions of sect. 11 of 5 Eliz. c. 23, which deal with the issue of the writ de excommunicato capiendo in, among other places the County Palatine, apply to the substituted writ. The direction is for sending a significavit by mittimus, and that is just what was done here, and the statute says in that case the judge or proper official shall have power to make like process to the inferior officers, to whom the execution of process there doth appertain. But it is said this is not making like process, because by 53 Geo. 3, c. 127, process by writ is confined to the form of writ there given, which is tested "ourselves at Westminster," whereas the other form would be witnessed by the judge of the County Palatine, but this is to put far too limited a meaning on the words "like process." It is not necessary that the process should be like in having the name of the same king or queen, the same date, or the same place where it is to be executed, but it is to be a writ issued by a competent authority for the purpose of commanding the proper officer to attach the body of the person named.

The third point was that the Vice-Chancellor could not exercise this jurisdiction sitting at Lincoln's Inn. I think, however, that the case comes within 13 & 14 Vict. c. 43, s. 13. That section says that in all matters over which the Court of the County Palatine may have jurisdiction it shall be lawful for the Vice-Chancellor when out of the limits of the jurisdiction to hear and determine all pleas, and so on, and all motions, petitions, and other matters for facilitating the progress of any suit or business pending in the Court which he might lawfully hear in the jurisdiction. Either this was a judicial matter, business pending in the Court, in which case it comes within the section, or else it was a mere ministerial matter. In either case the objection fails. I think, therefore, we ought not to grant the rule.

LINDLEY, J. I am of the same opinion, and I will state shortly the reasons why it appears to me there should be no rule.

The first question raised was that of Lord Penzance's jurisdiction to sit at Westminster and issue the significavit, and to call upon Mr. Green to come before him for that purpose. This must depend on the construction of the Public Worship Regulation Act, 1874. The argument, as I understand it, was that his jurisdiction at Westminster was over when he had heard the matter of the representation referred to him, and that these were consequential proceedings, which he had no jurisdiction to do, except as the judge of the province of York, and that he could therefore only do these things within the local limits of that province. Now, that to my mind is not consistent with the true construction of the Act of Parliament. The jurisdiction given by it is found mainly in ss. 7, 9, and 13. He is first of all to hear the matter of the representation referred to him by the bishop. Now pausing there for a moment, I should construe the expression "matter of the representation" in rather a wide sense than a narrow one, and take it to mean the whole of the matter, that is, matters arising out of the thing referred as well as the thing actually referred. There are various clauses stating how he is to hear and determine the matter referred. That his duties do not end when he has done that is plain from the 13th section. That section relates to inhibition, and the end of it is "any question as to whether a monition or order given or issued after proceedings before the bishop or judge, as the case may be, has or has not been obeyed, shall be determined by the bishop or the judge, and any proceedings to enforce obedience to such monition and order shall be taken by direction of the judge." Where is the judge to do this? The Act of Parliament does not point this out in terms, but it appears to me that it is not in accordance with the rational construction of this section to say that he is to hear the representation up to a certain point in the place in which he is requested to sit by the bishop, and that for all consequential applications, including costs, he is to sit elsewhere. It seems to me that he has jurisdiction to do everything which it is necessary for him to do in working out this Act at any of the places referred to in the request of the bishop, and that this is a step in the proceedings and not merely something outside the representation which he could only do in his character of judge of the Province of York, and therefore within the limit of that province.

The second point seems to me to be plain. By 53 Geo. 3, c. 123, the writ de excommunicato capiendo was abolished, and the new writ substituted for it, but there is no sign of any intention to interfere with the local and exceptional jurisdiction; indeed the reference to the Act of Elizabeth shews that nothing of the kind was intended. If we were to put another construction on the Act it would be to make the Queen's writ run where it did not run previously. The scheme is simply that of substituting one writ for another, and dealing with the new writ just as the former one was dealt with, so that when the writ is required to run into the County Palatine the mittimus is sent and not a writ, and the new writ is issued there just as the old writ would have been.

As to the third point I take it the Vice-Chancellor of the Duchy had no power to exercise jurisdiction out of the local limits of the Duchy except by Act of Parliament. But the Act 13 & 14 Vict. c. 43, s. 13, gives him that power in a matter pending as this seems to me to be.

On all the points I think the argument fails, and that the rule must be refused.

Rule refused.

Mr. Green then renewed his application by way of appeal to the Court of Appeal. The Lords Justices granted a rule nisi.

April 12, 1881. *Sir H. James, A.G.*, and *Sir F. Herschell, S.G.* (*A. L. Smith*, with them), for Lord Penzance, shewed cause. The first objection brought against the writ is that Lord Penzance sitting at Westminster had no jurisdiction to hear the case and issue the writ of significavit, in respect of disobedience to an inhibition, issued by him as Official Principal of the Provincial Chancery of York, for breaches of ecclesiastical law committed within the province of York. The question depends entirely on the Public Worship Act, 1874. The Court was established by that Act as a new Court of Record and with new powers, though the judges succeeded to the jurisdiction of the old Courts of Arches and the Chancery Court of York.

[COTTON, L.J. The contrary was decided in *Dale and Enraght's Cases* (1), where it was held that the Court was not a new one.]

The 9th section of the Act enacts that if the parties will not submit to the direction of the bishop, "The bishop shall forthwith transmit the representation in the mode prescribed by the rules and orders to the archbishop of the province, and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster." It is not denied that Lord Penzance had power under this section to hear the matter of the representation at Westminster, but it is argued that the application for a significavit must be heard in the Province of York. "The matter of the representation," however, means all the proceedings both for deciding the complaint and for enforcing the judgment against the parties. The expression is in constant use in all courts of justice in that sense, and in the rules issued under the Public Worship Act, which have the form of a statute, the forms for a monition and prohibition are headed, "In the matter of the representation of C. D." It would be most unreasonable if the question whether the defendant had been guilty of the offences charged in the representation were to be tried in one place, and the question whether he had been guilty of disobedience to the monition were to be tried in another.

The other objections to the writ do not affect the jurisdiction of Lord Penzance.

West, Q.C. (Attorney General for the Duchy of Lancaster), *Glasse, Q.C.*, and *Clare*, for the Vice-Chancellor of the Duchy of Lancaster.

Jeune, for the complainants. With respect to the first point, it is impossible to draw any line where the judge is to leave off

(1) 6 Q. B. D. 376.

sitting at Westminster, and go to some place within the Province of York. The only reasonable construction of the words is that the whole proceedings are included in the "matter of the representation." After the place of hearing had been fixed at Westminster the judge could not sit anywhere else: *Hudson* v. *Tooth.* (1)

The second objection to the writ is that the Petty Bag Office, dealing with a matter arising within the Duchy of Lancaster, sent a transcript of the significavit with the mittimus to the Chancellor of the Duchy, which the appellant says was irregular. But that is the invariable practice of the Office, and the only practice that is consistent with law. The Queen's writ not running in the County Palatine, the writ is not sent there directly from the Petty Bag Office, but an order goes to the Chancellor of the Duchy to issue a similar writ. This is in accordance with the statute 5 Eliz. c. 23, s. 11 (2), which deals with the execution of the writ, "De excommunicato capiendo," in exempt jurisdictions. Then the 53 Geo. 3, c. 127, was passed, which abolished writs de excommunicato capiendo, and substituted for them writs de contumace capiendo. By s. 1 of that Act, it was enacted that all rules and regulations not thereby altered, then by law applying to the said writ, and the proceedings following thereupon, and particularly the several provisions contained in 5 Eliz. c. 23, should extend and be applied to the writ de contumace capiendo and the proceedings following thereupon, as if the same were particularly repeated and enacted. This was re-enacted by 2 & 3 Wm. 4, c. 93. So that the Act of Elizabeth is incorporated in the Act of George III., and the new writ is to go as the old writ had gone into the exempt jurisdictions. Otherwise the exempt jurisdictions would be exempt from all ecclesiastical jurisdiction. The uniform practice of the Court has followed this direction. Numerous writs have been issued in this way out of the office of the sheriff of the County Palatine; many of them in church rate cases which must have been followed by the actual payment of money.

---

(1) 3 Q. B. D. 46.

(2) 5 Eliz. c. 23, s. 11. "Provided always that in Wales, the counties palatines of Lancaster, Chester, Durham, and Ely, and in the Cinque Ports, being jurisdictions and places exempt, where the Queen's Majesty's writ doth not run, and process of capias from thence not returnable into the said Court of the King's Bench, after any significavit being of record in the said Court of Chancery, the tenor of such significavit by mittimus shall be sent to such of the head officers of the said county of Wales, counties palatines, and places exempt, within whose offices, charge, or jurisdiction the offenders shall be resiant, that is to say to the chancellor or chamberlain for the said county palatine of Lancaster and Chester, and for the Cinque Ports to the Lord Warden of the same, and for Wales and Ely and the county palatine of Durham to the chief justice or justices there. And thereupon every of the said justices and officers to whom such tenor of significavit with mittimus shall be directed and delivered, shall by virtue of this statute have power and authority to make like process to the inferior officer and officers to whom the execution of process there doth appertain, returnable before the justices there at their next sessions or courts two months at the least after the teste of every such process. So always as in every degree they shall proceed in their sessions and courts against the offenders as the justices of the said Court of King's Bench are limited by the tenor of this Act, in term-times to do and execute."

The third objection is that, assuming that the Vice-Chancellor of the Duchy of Lancaster had jurisdiction he had no power to sit in Lincoln's Inn, but could only exercise it within the limits of the Duchy. The application was first made to the "cursitor" at Preston. In an ordinary case he would issue the writ as of course, but considering the nature of this particular case he referred it to the Vice-Chancellor. The office of the Vice-Chancellor is merely ministerial. There was no occasion to lay the matter before him at all.

[Brett, L.J. In *Dale and Enraght's Cases* (1) we decided that the judges of the Queen's Bench were to look and see that the form of the writ was right; here the Vice-Chancellor must be supposed to read it. Can it be said that his duty is merely ministerial.]

In the case of an ordinary writ the statute says (s. 2) that the writ is "to be opened in the presence of the justices;" but there is no such direction in the case of the Chancellor of the Duchy of Lancaster. In this case his duty is merely ministerial, it is like an ordinary writ issued out of the Chancery Division to the Vice-Chancellor of the Duchy of Lancaster. Being merely ministerial the act can be done anywhere. But if it is in a sense judicial 13 & 14 Vict. c. 43, s. 13, applies. By that section the Vice-Chancellor of the County Palatine has power to hear out of the limits of his jurisdiction "all motions and other matters for facilitating the progress of any suit or business pending in the said Court." The significavit had been sent to him, and therefore the business was pending in his Court.

---

(1) 6 Q. B. D. 376.

Charles, Q.C., and *Phillimore* (*Poland*, with them), for the appellant, in support of the rule. With respect to the first point, Lord Penzance has become Official Principal of the Provincial Chancery of York as well as Dean of Arches of Canterbury. This matter arose in the Province of York, and he could only exercise his jurisdiction as Official Principal of York within that province except by the 9th section of the Public Worship Act which has been referred to. That section gives him power to hear "the matter of the representation" in London or Westminster, but on pronouncing his judgment on the matter his jurisdiction out of his province ended. If the defendant did not obey the monition, the inhibition and all other proceedings for enforcing it were new proceedings, in which he had to exercise his general authority as Official Principal of the Province of York, and only within that province: *Serjeant* v. *Dale* (1); *Dale and Enraght's Cases* (2); *Hudson* v. *Tooth.* (3) In form 13 of the forms appended to the Public Worship Regulation Act the form of the requisition by the archbishop to the judge is given. It is "to hear and determine the matter of the said representation at some place in London or Westminster or within the diocese of, &c." That only includes the judicial hearing, or at all events only the proceedings down to the issuing of the monition, but the inhibition is a separate proceeding commenced by the complainant under s. 13 and regulated by Rule 26. The whole enquiry on the application for the inhibition is different from that on the hearing of the matter of the representation, the evidence is different, and there would be no inconvenience in trying it in the province, although the matter of the representation was tried in London. The section provides that twenty-eight days' notice shall be given of the time and place of the hearing. It is impossible to suppose that this was intended to apply to every step in the proceedings.

[Brett, L.J. According to that argument if application were made to the judge to suspend a monition made in London, pending an appeal, under the last clause in the 9th section, that application must be made in the Province of York.]

---

(1) 2 Q. B. D. 558.

(2) 6 Q. B. D. 376.

(3) 3 Q. B. D. 4~~0~~. 67

The appellant's construction is confirmed by the former part of the section, for the same words "the matter of the representation" are used of the hearing before the bishop, who, it is clear, cannot go beyond the monition.

With respect to the second objection, the effect of the 1st section of 53 Geo. 3, c. 127, was that although the old writ de excommunicato capiendo did not run into the County Palatine, the new writ de contumace capiendo, which was a creation of the statute, did run, as was the case with writs of exigent: see 5 & 6 Edw. 6, c. 26. Therefore the regulations of the 11th section of 5 Eliz. c. 23, respecting the introduction of the old writ into exempt jurisdiction do not apply to the issue of the new one, but are only applicable after the writ is issued.

As to the third objection, the Vice-Chancellor of the Duchy of Lancaster had no jurisdiction to hear any motion or matter except for facilitating the business of some suit or business pending in his court. The issuing of the writ did not come within these words. The proceedings against Mr. Green were pending in the Ecclesiastical Court, not in the Lancaster Court. It was clearly a judicial act. The Vice-Chancellor gave notice to Mr. Green that he should hear the application, and if he had seen anything wrong on the face of the significavit, it would have been his duty to refuse to issue the writ.

James, L.J. I am of opinion that the rule must be discharged on all the points that have been raised. The first, and probably the most important point, is that which is raised as to the jurisdiction of Lord Penzance to hear the application sitting in his room at Westminster, being a place in which he was authorized to sit for hearing the matter originally. No doubt the statute is not altogether very easy to construe. There may be some difficulties in the language found in different parts of it which may puzzle us a little, but we must construe it as a whole and see what was the object of the statute and what was intended to be done by it. We must construe it with reference to that object and intention as we gather them from the statute itself, and we have no right to look at anything else.

Now, I am of opinion that the words "to hear the matter of the representation" cannot be limited to merely sitting there and hearing the charges read. The words must have a meaning beyond the mere sitting there and listening. It must mean to hear and determine, and it is conceded that to hear and determine must mean to hear and determine and pronounce judgment upon the matter. It appears to me that it goes further than that. The plain meaning of the Act of Parliament is that the subject-matter of the representation, that is, the ecclesiastical cause or matter which is the subject-matter of the representation, the charge against the clerk supposed to be offending, is to be dealt with judicially by the judge if required so to do by the archbishop, who has the power to direct him in certain cases to hear it. It is to be dealt with by him as a judge; the thing itself is attached to his jurisdiction, and he is to hear it, and determine it, and deal with it. I say he has to deal with it, dispose of it. The word "determination," which is introduced into the form set out in the rules, and was conceded in the argument to be of binding force, seems to me to imply that it is a fair and reasonable construction of the statute to say that it means the hearing, dealing with, and disposal of the whole thing, and that includes every proceeding pending the hearing, and every proceeding subsequent to the hearing, but being part and parcel of the thing or cause which was so attached to the judge. I think that is the meaning of the 9th section of the Act of Parliament, and every convenience would seem to point to that being the proper meaning, and we must always in these cases have regard, in construing somewhat analogous expressions, to what would be the convenient and inconvenient results arising from it. I have never had any answer from the appellant in this case to the objection arising on the clause at the end of the 9th section, which Brett, L.J., pointed out very early in the argument. Is it conceivable, is it consistent with anything like a sensible interpretation, that after the judge has determined the case, has pronounced his sentence ending in a monition, then, if the party is minded to appeal from that as from any other judicial sentence of that judge, the judge himself cannot entertain any application to suspend his own sentence pending that appeal in the place where he pronounced it? If the defendant could not go at once to the same judge and ask him to suspend the monition, he would be utterly remediless until the judge should find himself, if he ever did find himself, within the limits of the Province of York. That would be a very startling result, and so startling that it shews to my mind that the power of the judge does not end when he has declared whether the defendant has been guilty or not guilty of the offence, and when he has said, "I admonish him not to continue his offence."

Then as to proceedings as to the costs. It would obviously be very inconvenient if every application with regard to costs of the proceedings required that the judge should absolutely leave Westminster, where he heard the case, and go for all these incidental matters all the way to York, and if he did not go down there, that the parties should be left entirely without remedy. It appears to me that if we give the plain meaning to the word "hear," "to hear, determine, and dispose of," then it follows that every incident of the case is to be dealt with by the same judge in the same place in which he has authority originally to hear it, and therefore that the ground for the objection on that score fails.

Then with respect to the second objection arising out of the transmission of the writ to the County Palatine, certainly the result would be very startling if we should upset a practice which has prevailed ever since the statute, and probably long before the Statute of George III., without some very plain reason. And when you come to look at the Act of Parliament of George III., it does seem to me that all the provisions of the Statute of Elizabeth are really preserved in the Statute of George III., and made applicable to the new writ de contumace capiendo, as they were previously applicable to the writ de excommunicato capiendo, and that amongst other things one part which is preserved, is that clause of the Statute of Elizabeth which refers in terms to the exempt jurisdictions, and to the fact that the writ does not run there, and provides the whole machinery for dealing with the case of those exempt jurisdictions. Now if the only change that was intended to be made, was to substitute the word "contumace" for the word "excommunicato" in the new writ to be issued, it would be very strange indeed, if the whole system of law, the whole relation between the Counties Palatine, and the Court and officers of the Counties Palatine, and those Courts which sit at Westminster, were changed without any reference at all to change, without there being anything to call attention to it. Therefore, when we find that there is no apparent intention to alter the privileges of the County Palatine, when we find that in terms the provisions of the Statute of Elizabeth are preserved, it seems to me they are preserved, so as to preserve that 11th section, and that we must read the Statute of George III., in exactly the same way as if that 11th section had been re-enacted in so many terms with the proper variations in the Statute of George III. If that clause is to be read as if it were introduced into the Statute of George III., it follows that the practice which has prevailed is well authorised by the statute, and that that objection ought to fail.

In respect to what was supposed to be some excess of jurisdiction on the part of the Vice-Chancellor, it appears to me that what he did was a mere work of supererogation. The Vice-Chancellor was really not called upon to do anything more than give his advice as being a member of the Chancellor's staff, he was called upon by one of the less distinguished and eminent members of that staff to advise him as to whether he should issue the writ. That advice he might give sitting in London, quite as much as sitting in the County Palatine of Lancaster. With regard to the Chancellor himself, what the Chancellor has to do with it, in issuing his writ on receiving the mittimus, certainly is not a judicial act. It is not a ministerial act. He is not a servant of the Court of Chancery in England, but he is a general officer of state of the Queen, and the Queen sends to him from the Chancery of England a direction to give effect to the process that has been issued; and he does that, not personally, of course, for nobody supposed that the Chancellor of the Duchy would personally deal with anything of that kind, any more than the Lord High Chancellor deals with the issue of attachments or other writs in his court. The judge of the Chancery Division does many things through his clerk, to which necessarily his own judicial mind would not be applied, and in this case the Chancellor issued the writ through the proper officer.

Brett, L.J. I am of the same opinion. It seems to me that the first question depends on what is the proper construction of the 9th section of the Public Worship Regulation Act. In order to construe that Act, I cannot accept what was suggested by the Attorney General, if we understood him rightly, that any new court of any kind was constituted by this Act. At all events, I adhere absolutely and entirely to what was said in the former judgment in *Dale's and Enraght's Cases* (1), that there is no new court whatever, there is no new judge whatever, that the judge is not a judge appointed by this statute, that there are the two courts of the Province of Canterbury and York still existing as they were before, that the mode of appointing the judge is altered, but that the judge is actually appointed by the very same persons who appointed him before, and that all his power is derived from the appointment by the same persons who appointed him before; only the statute says that these persons must appoint jointly and must appoint the same person to be the judge of both of the two courts, the same courts that existed before. Now, with regard to the construction of this 9th section, if Mr. Charles's argument were right, the logical result of it must be, that all that the judge can hear at the place required by either of the archbishops is that which is contained in the representation, and that every other step in the cause must be decided by him in the province. I think that construction was felt to be so practically absurd that it was not insisted upon, and it was admitted that the words, "The matter of the representation" must go somewhat further than that. If they go further than that, I can see no stop. They must then mean that the whole cause, the whole matter of complaint, from the beginning to the end, must, or I would rather say, may be heard at the place required by the archbishop, and the whole proceedings and every part of the proceedings from the beginning

---

(1) 6 Q. B. D. 376.

1881

Ex parte Green.

Brett, L.J.

until the will of the Court is finally executed, are contained in the words "the matter of the representation" in the last part of the 9th section.

It was said that that could not be so having regard to the former part of the 9th section, where the same phraseology is used with respect to a hearing before the bishop by the consent of the parties. Now, in my opinion, if the power of the bishop to hear the matter by the consent of the parties had finished with the words of the 9th section, then the bishop would have had power to carry on the matter to the very end, and he would have had power to do that which at the end of the 13th section it is said the judge alone can do. I think if it had not been for the restrictive words at the end of the 13th section, the bishop, by reason of the words in the 9th section, would have had the power of enforcing his judgment up to the end; in other words the primary meaning of the phrase to hear the matter of the representation would have carried the whole matter from beginning to end, even before the bishop. But the restrictive words at the end of the 13th section took away a part of the power from the bishop and gave it only to the judge. Then I cannot help thinking that the high authority of those eminent persons who drew the rules under the Act, may be cited in order to support our construction of the 9th section, for it seems to me that in drawing the rules and using the phraseology which they have used in those rules, namely, "in the matter of the representation," as used there, it is shewn conclusively that they consider the construction of the 9th section to be as we say it is. On the first point, therefore, it seems to me, that the learned judge when he is required to hear the matter of the representation at Westminster, may hear the whole matter from beginning to end at Westminster. It does not at all follow that he may not hear some part of it in the province, although he is required to hear it in Westminster, but that he may hear it in either place. I do not determine that point.

At to what took place with regard to transmitting this matter to the County Palatine, I confess about that I have no doubt whatever. I do not think it is so doubtful as the first point. It seems to me clear that the words of the Statute of George III., incorporated into the whole proceedings with regard to the writ de contumace capiendo, all that was contained in the Statute of Elizabeth with regard to the writ therein mentioned, and it is just the same as if the 11th section of the Statute of Elizabeth had been written into the Act of 1874. If so, where the matter does not affect the County Palatine there is one course of procedure, where the matter does affect the County Palatine there is another, and that is the procedure which has been followed in this case, and which I take it has been followed with regard to all these writs and similar writs, ever since the passing of the Statute of George III. That, I confess to me, seems to be a perfectly plain point.

With regard to the question of the Vice-Chancellor sitting at his chambers, in the first place I think he was merely giving advice, he was not acting within the statute at all, or with any legal competency. He was not acting as a judge of a Court at all, and if he is not, it is not a judicial proceeding. I do not mean that he is a mere conduit pipe, or that what he is to do is what is called merely ministerial. I think he is a high executive officer who has a discretion; but I think that where there is such a person with such a discretion, and it does not come within the rule of its being a judicial discretion, he may exercise his discretion not only in a place which is within his jurisdiction but in any place where he may be.

Cotton, L.J. I agree in the opinion at which the other Lords Justices have arrived, and I so agree with the reasons which they have given that I should add nothing but for the fact that the case is one of very great importance, and therefore I think it is right to the parties that I should give my opinion, and not merely give a silent assent. Before I give my reasons for disposing of this present application, I would say as Lord Justice Brett has done, a word about what was attempted to be argued by the Attorney General. He seemed to raise this contention that Lord Penzance was not sitting as the Official Principal of the Chancery Court of York, but as a new Court of Record constituted by the Act of Parliament. That according to my opinion is entirely contrary to the decision we gave in the *Dale and Enraght's Cases* (1) (to which I entirely adhere), that Lord Penzance, although at one time he was only one of the judges of that Court, now is the judge, that is the official principal, of the Court of the Province of York, and that it is as a judge of an ecclesiastical court, and of that ecclesiastical court only, that he has acted.

---

(1) 6 Q. B. D. 376.

That question being disposed of, the first point one has to consider is this, and it is one which I say frankly, having regard to the terms of the Act of Parliament, is not without difficulty, whether Lord Penzance had power to pronounce Mr. Green contumacious when sitting out of the province. Of course, unless the Act of Parliament gives him on its fair construction power so to sit, he had no jurisdiction as Official Principal of the Court of the Province of York to sit out of the province. Had he under the Act of Parliament power given him to sit where he sat at Westminster? He sat at the place pointed out by the requisition of the archbishop, and the whole point turns on the construction of the 9th section; of course this contruction being aided by other portions of the Act of Parliament. The words are "The archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province or in London or Westminster." Now, if that stood alone, I should without hesitation arrive at the conclusion that those words required the judge to hear the matter of the representation, including dealing with the whole case from beginning to end, not only originally to hear it, but to deal with the matter which might arise before the actual hearing, and also to go on and deal with everything that was incident to the matter being before him. He has power given him to order the production of documents and that might be made on application before the hearing, and probably would be so always as in other cases. That in my opinion was a matter which the archbishop would have requested him to deal with by his requisition to hear the matter of his representation. Then again he can suspend the issue of any judgment or monition pending an appeal. If he can suspend it sitting at that place, in my opinion he can go on and give any directions which may be necessary for the purpose of enforcing an order which he may have made in the matter. It is said that it may apply to all matters in which he is acting under the powers given him by the Act of Parliament, but that here he is dealing with a matter as to which there is no reference whatever in the Act of Parliament, that he is simply acting as an ecclesiastical judge, the Official Principal of the Court of the Province of York, and exercising the powers which he has as such judge independently of the Act of Parliament. No doubt that was so. In my opinion he was acting, though in other respects under power given to him by the Act of Parliament, as the Official Principal of that Court, and he had without any Act of Parliament the power which he exercised to declare Mr. Green contumacious. He was the same judge of the same Court, though acting as regards powers not specially mentioned or given to him by the Act of Parliament; and that I think disposes of that difficulty which certainly deserved attention. But the greater difficulty arises from this, that one does in some parts of this Act of Parliament, particularly in s. 9, find the words, "hear the matter of the representation," where it appears from the Act of Parliament that that was not to go beyond the original hearing and decision and the issuing of a monition and hearing and determining whether that monition had been obeyed. I think the true interpretation is that those words in the other part of the 9th section, when referring to what was to be done by the bishop, are cut down of necessity by the subsequent portions of the Act of Parliament from including what they otherwise would have done. If there is no such limitation as regards what is to be done by the judge, the reference to him may fairly include and carry with it that he shall have a jurisdiction to hear and dispose of the entire matter arising out of and contained in the representation while sitting outside the Province of York, where otherwise alone he would have jurisdiction. It is said that what immediately follows the power of the archbishop to require the judge to hear the matter bears against the construction which I put upon those words. It is this, that the judge shall not give less than twenty-eight days' notice of the time and place at which he will proceed to hear the matter of the said representation. No doubt that twenty-eight days' notice does not apply to all proceedings, which in my opinion he had jurisdiction to hear out of the province, in consequence of the request; but upon a fair construction of that clause, it refers to the original hearing and to that only; and it is not sufficient ground for cutting down the previous words, and arriving at the strange conclusion, that although the judge has jurisdiction given to him to entertain the original hearing out of the jurisdiction, and has also powers given to him incidentally, and for the purpose of dealing with the original hearing, that one proceeding is to be in Westminster, and the other of necessity in the province. I think, therefore, on the true construction of this Act of Parliament, the requisition of the archbishop did give Lord Penzance power to dispose of the whole matter arising on this representation out of the province and at Westminster, being one of the places mentioned in that requisition.

As regards the other matters, I think one may deal with them more shortly. The question was whether this significavit was properly sent by mittimus to the Chancellor of the County Palatine. I think the true construction of the Act of Geo. III. was that which I pointed out during the argument, that it did away for this present purpose entirely with the writ de excommunicato capiendo, and substituted for it power for a judge to declare the party contumacious, and that then there should be a significavit and a writ de contumace capiendo. But the words in the Act of Geo. III., fairly construed, I think do go to this, that you must read the Act of Elizabeth, as if instead of the old writ de excommunicato capiendo therein referred to, a writ which has now been created a writ de contumace capiendo had been enacted in terms; and construing the Act in this way the Act of Elizabeth will apply, and the proper proceeding has been taken in this case (subject to the only remaining point), by sending a copy of the significavit by mittimus to the Chancellor of the County Palatine, and requesting him to act under that 11th section.

The only other point put to us was this, whether the Vice-Chancellor had power to deal with the matter before him in Lincoln's Inn. There is nothing in the Act of the 5th Elizabeth which requires the Chancellor of the County Palatine to hear the parties or to have any motion made before him, or to make any order before the writ de contumace capiendo is issued by him, and in my opinion what was done by the Vice-Chancellor was unnecessary, and merely, I presume, because before giving any direction to the officer of the County Palatine, he thought it right that the party in so important a matter should have an opportunity, if he thought fit, of coming before him and stating his objections. In my opinion that was a mere gratuitous act on his part not in any way required by the statute. However, the objection has been taken, and ought to be dealt with. I by no means say that the act of the Vice-Chancellor is a purely ministerial one, I think it was not, but it was not a judicial one, and, in my opinion, even although he had, as I think he had, a discretion to be exercised under the Act of Elizabeth, if any difficulty or question arose, yet I can see no reason why he should not exercise that discretion, not in his judicial capacity, but as the head of the executive of the County Palatine in London, or elsewhere, out of the County Palatine. In my opinion, therefore, the objections in this case all fail, and the rule must be discharged.

The appellant must pay the costs of the complainants, and of Lord Penzance. The Vice-Chancellor of the Duchy of Lancaster will have no costs, as there was no occasion for him to appear.

Solicitors for appellant: *Tebbs & Son.*

Solicitors for complainants: *Brookes, Jenkins, & Co.*

Solicitor for Lord Penzance: *Solicitor to the Treasury.*

Solicitor for Vice-Chancellor of the Duchy of Lancaster: *Solicitor to the Duchy of Lancaster.*

M. W.

[IN THE COURT OF APPEAL.]

1880
Dec. 2, 3.

WAKE AND ANOTHER *v.* HALL AND ANOTHER.

Mine—High Peak Mining Customs and Mineral Courts Acts 1851 (14 & 15 *Vict.* c. 94)—*Fixtures—Right of Miner to remove Buildings erected for Mining Purposes.*

Under the mining customs set out in the schedule to, and confirmed by, the High Peak Mining Customs and Mineral Courts Act, 1851, all persons are entitled to search for veins of lead ore "under all manner of lands" situate within the limits of the Act, "of whose inheritance soever they may be," and the "first finder" of any such vein is entitled to have allotted to him by a certain mining official, called the "barmaster," a certain proportion of such vein. Upon allotment, the allottee becomes entitled to the exclusive right of working so much of the vein as is allotted, so long as he continues to work it; and further (by the 5th of the Scheduled Mining Customs) he is, so long as he works such mine, entitled, without making any payment for the same, to the exclusive use of so much of the surface land as is necessary for the proper working of the mine. If the miner ceases to work his mine, the barmaster may (under the 19th of the above mentioned customs) give him notice that his mine will be forfeited, unless within a certain specified time the working be resumed, and in the event of non-compliance with the notice, the barmaster may give the mine to any other person who is willing to work it:—

Held, that a miner, who in exercise of his rights under custom 5, has erected upon the land of the surface owner buildings reasonably necessary for the working of his mine, is entitled as against such surface owner to pull down and remove the materials of such buildings at any time whilst he continues to work the mine, or within a reasonable time after he has ceased to do so, and before he has done any act shewing an intention to abandon the mine other than the act of pulling down such building, notwithstanding that such buildings may be built of brick or stone, with foundations sunk into the soil; but that he is not entitled to remove them after he has allowed such reasonable time to expire or has otherwise indicated an intention to abandon the mine, although he may have received no notice of forfeiture from the barmaster under custom 10.

affirmed by H of L 8 App Cas 195.

THE plaintiffs are landowners in the Liberty of Hucklow, in the district of the King's Field, in the Hundred of the High Peak of Derbyshire, and within the limits of the High Peak Mining Customs and Minerals Courts Act, 1851. The defendants are owners of a lead mine, situate under the plaintiffs' soil, and deriving their title to such mine from the customs (1) set out in the schedule to the above mentioned Act. The defendants had prior to 1872, for the purposes of their mines and in the exercise of their rights under such mining customs, erected upon the plaintiffs' land an engine-house, boiler-house, and other buildings, all of them being built of brick or stone and with foundations sunk to a considerable depth.

---

(1) Such of the customs as are material to this case are sufficiently set out in the judgment of the Lord Chancellor.

In 1872, they ceased to work the mine, and in 1873 and 1874 they pulled down such of the above mentioned buildings as contained fixed and unfixed machinery, and sold the building materials and the machinery both fixed and unfixed. Later on, in the year 1874, they converted certain other of the above buildings (which were still standing) to purposes wholly unconnected with the mine, and continued to use them for such purposes down to action brought.

The defendants never resumed the working of their mine, but no notice of forfeiture had at the date of action brought been given to them by the barmaster.

In 1878, the plaintiffs brought the present action to recover possession of the land occupied by the defendants' buildings together with the buildings still standing on it, and also to recover damages for trepass in pulling down the buildings pulled down in 1873 and 1874. The action was tried before Lord Coleridge, C.J., without a jury. His Lordship held that the plaintiffs were entitled to recover possession of the land and buildings still standing on it, but gave judgment for the defendants on the residue of the claim.

Both parties appealed.

Mellor, Q.C., and *C. Gould*, for the plaintiffs.

Graham, for the defendants.

LORD SELBORNE, L.C. The plaintiffs' appeal in this case raises the question whether the defendants were entitled (as Lord Coleridge has held) to pull down and remove the materials of an engine-house, boiler-house, and other buildings (all of them brick or stone structures, with foundations sunk to a considerable depth), which they had erected for mining purposes upon the plaintiffs' land, within a district called the "King's Field" or the "King's Fee," in the hundred of the High Peak of Derbyshire.

The hundred, and the mineral duties in this and some other parts of it, belong to the Crown in right of the Duchy of Lancaster; and there can be no doubt that the "King's Field" or "King's Fee" was anciently Crown property. Before the time of legal memory (as appears from a statute passed in 1851) there were certain mineral laws and customs in force throughout this district, with courts to administer them, which (as amended and established by that statute) subsist to this day. By these laws and customs, any subject of the realm was entitled to search for, and to work, any mines or veins of lead ore which might be found within the district, paying royalties to the Crown or its lessees. Such laws, customs, and courts could not have originated otherwise than by grant, licence, or other authority of the Crown while it retained the ownership of the soil; and all grants of lands within the district must be taken to have been made by the Crown subject to those laws and customs, and to the mining rights thereby conferred or recognised. The effect, practically, was to except out of all such grants, and to reserve to the Crown, all mines and veins of lead within the district, to be worked by such persons as should entitle themselves so to work according to the custom, on payment or render to the Crown of its accustomed dues and royalties.

The plaintiffs' title to the land, on which the buildings in question were erected, cannot (in my opinion) stand higher than that of a grantee subject to such an exception and reservation, and I consider the title of the defendants, who were miners working under and according to the custom (as their predecessors had been in the same place, or on the same vein, for two centuries), to have been substantially equivalent to that of licensees, admitted by the proper officers of the Crown to work the minerals reserved to the Crown, and to exercise all privileges incident by the custom to the right of working such minerals.

Under the Act of 1851, and the customs scheduled to it (which were thereby established, as the only conditions to be thenceforth in force against owners of the soil), books were to be kept by an officer called the "barmaster," for the registry of mineral titles acquired, by gift or transfer, in the customary way. Every one was to be at liberty to search for veins of lead ore "under all manner of lands, of whose inheritance soever they might be," upon certain conditions. When any new vein was found, the "first finder" was to have measured and set out to him, by the barmaster, in the presence of two grand jurors, "two mears in length of the vein," and a third "mear" (it is not necessary to state its dimensions) was at the same time to be allotted to the Crown lessees, or (if there were none) to the Queen. If neither the Crown lessees nor the Queen chose to work this third "mear," the "first finder" was to be entitled either to purchase it from the Crown on certain terms, or to work through it, reserving the ore found there (less expenses) for the Crown. Every person working any such vein was to pay duties, called "lot and cope," to the Crown: and the customs made careful provision for the manner of ascertaining them. No render of any kind was to be made to the landowner, who, if he should himself desire to work any vein of lead within his own land, had no greater or better right than that which was open under the custom to all the Queen's subjects; and if he worked the mines at all he could only do so upon the customary terms, and on payment of the customary royalties.

App Cas 202

The 4th and 5th customs, scheduled to the Act, define the miners' surface privileges. Under the 4th they were to have set out for their use by the barmaster, without any compensation to the occupiers or landowner, ways from the mine to the nearest highway, and also to the nearest running stream, spring, or natural pond, such ways, and also the water of such stream, &c., to be used by them for mining purposes only; and "all rights of way to cease when the mine should be no longer worked." The 5th custom (so far as material) is in these words: "Every miner shall, so long as his mine shall be worked, be entitled, without making any payment for the same, to the exclusive use of so much surface land as shall be thought necessary by the barmaster and two of the grand jury, and be set out by them for the purpose of laying rubbish, dressing his ore, briddling, making mears or ponds, and conveying water thereto, and any other mining purposes." It is not disputed that, under these words, the miner was entitled to erect upon the surface so set out for his exclusive use, any buildings necessary or proper for mining purposes, such as those now in question are admitted to have been; and the buildings in question were in fact created for such legitimate mining purposes upon surface ground so appropriated for the exclusive use of the defendants, or of their predecessors in title, while working their mine according to the customs.

Among the admissions entered into between the parties at the trial is one to this effect: that "it has been the practice in the district for miners to erect buildings and fix machinery, similar to the buildings and machinery of the defendants, for mining purposes, and from time to time to alter and vary the description and character of the buildings and machinery, as improvements have been discovered and introduced." This is, in my judgment, material, not indeed as adding anything to the scheduled customs (which would be contrary to the statute), but as shewing how the 5th of the scheduled customs has been always, in practice, understood and acted upon.

Two more only of the scheduled customs require to be mentioned. The 19th provides that, if the barmaster "finds any mine or vein neglected and not wrought, and not hindered by water or for want of air," he may, "if required so to do by any person or persons," give notice that "the mine will be forfeited at the expiration of three weeks if not duly and reasonably worked to the satisfaction of the barmaster and grand jury, and no other sufficient reason assigned to them;" and that if, at the expiration of that time, the mine or vein is not so worked, the barmaster may then "give such mine or vein to any person or persons willing to work the same."

The 2nd custom gives the landowner power to sell and dispose of "the calk, feagh, spar, and other minerals and rubbish (except lead ore), and to remove the same from his land, *so soon as the lead ore has been extracted from it*, when and as often as he thinks proper, and when not required for the use of the mine, but not so as to destroy or injure any mineral property, without the consent of the barmaster and two members of the grand jury." The term "mineral property," under the interpretation clause of the Act, includes "the works, rights, and appurtenances connected with mines and veins of lead, and also lead ore."

No notice of forfeiture was given to the defendants under the

19th custom. They worked their mine down to June, 1872, and, according to the admissions on both sides, they then "suspended working the mine;" but it remained till the commencement of the action (I still refer to the admissions) "in the possession of the defendants, and registered in their names in the barmaster's books." In 1873 and 1874 they pulled down the buildings in question and sold the materials, together with the fixed and unfixed machinery which the buildings had contained. In 1874 they converted other buildings (still standing upon the land) to uses unconnected with mining; and they continued so to use the latter buildings till the action was brought. The working of the mine was never resumed; the fact being that, although not exhausted, it had ceased to be remunerative. There were upon the ground, till after 1874, divers hillocks of material raised from the mine, composed of spar and other mineral substances containing lead capable of being extracted; and it had been the practice of the defendants and their predecessors, and of the district generally, to work and rework such "hillocks" by certain processes for the purpose of extracting the lead contained in them.

Upon these facts—reasoning in some degree from the analogy of the law of removable fixtures, but more (as it seems to me) from the special nature of the customs, and endeavouring to interpret those customs on points where they were not explicit, and in the absence of authority "so as to do justice"—Lord Coleridge has held, that the miners "having erected (possibly very expensive) machinery and machine-houses, in the exercise of their own rights, and without any reference to a bargain with the landowner," had a right to remove them at any time prior to a complete abandonment of the mine. The point, as far as I know, is new. It ought, in my opinion, to be determined on the same principles as if similar buildings had been erected, and afterwards removed, by an owner in fee simple of minerals reserved and excepted by a deed granting land subject to such exception and reservation, with powers for the mineral proprietor to use the surface of the land for all purposes incident to the working of the mines, including the erection, for those purposes, of buildings of this character. The rights of the Crown, and of the miners, whom I regard as (in substance) licensees of the Crown under the High Peak customs, seem to me to stand upon the same footing.

Not much light for the determination of this question is (in my judgment) derivable from the law of removable fixtures. Buildings of this character are certainly not removable fixtures, as between landlord and tenant, without a contract to that effect (unless they come within the 3rd section of 14 & 15 Vict. c. 25), whether they are erected for trade or for any other purpose. I do not dwell upon this (which I have always understood to be clear law) because it is very satisfactorily dealt with by the able judgment of Vice-Chancellor Kindersley in *Whitehead* v. *Bennett* (1), cited by Mr. Mellor in reply. But the question in the present case, where the devisee has no estate at all in the land, where he is neither tenant nor trespasser, but has a right, paramount to the title of the landowner, to impose upon the surface, for the purposes of his mining operations, the burden of carrying such buildings and machinery as may be necessary and proper for those operations as incident and appurtenant to his own mining property, appears to me to be entirely different.

As between landlord and tenant, the tenant makes the buildings which he erects part of that land in which he has himself an estate in possession, the reversion being in the landlord. It is by virtue of his tenure of the land, and of the terms of that tenure, that he is (on the one hand) enabled to erect such buildings, and (on the other hand) prevented from pulling them down. He cannot commit waste, and that is the only reason, that I am aware of, why he cannot pull them down and remove them during his term. The principle is so stated by Lord Ellenborough in the case (referred to during the argument) of *Elwes* v. *Mawe.* (2) "The general rule" (he says) "on this subject is that which obtains between heir and executor; and that rule (as found in the Year Book 17 Edw. 2, 518) is, that where a lessee, having annexed anything to the freehold during his term afterwards takes it away, it is waste." But between the miner and the landowner, under the High Peak customs, there is no privity of title. The miner does not hold of the landowner: he has an easement over the land entitling him for particular purposes to use the surface; he puts there what he pleases (for those purposes) in the exercise of that dominant right, and he may (as it seems to me) by virtue of the same right also remove it; he is not a trespasser in so doing, the doctrine of waste is inapplicable to this case. In the absence of any positive law or judicial authority applying to such a case the maxim, "quidquid plantatur solo, solo cedit," I think that reason and principle is against so applying it. Why should these erections, created with the miner's money for the miner's purposes as incident to his mineral property, be treated, not as part of that property, but as accretions to the estate of the landowner who is a stranger to it? Why should not the miner's right to the exclusive use of that part of the surface enable him to do with the materials which he has placed upon it, whether structures of brick and stone or anything else, and whether fixed into the ground or not, whatever is necessary or convenient for the purposes of his mining operations, so long (at all events) as those operations continue. How can it be consistent with the purpose for which he has this right that the landowner should be entitled to come in and to say, this is part of my land, you have made it so, it is now mine and not yours? If the mineowner has the right of alteration and removal during the continuance of the mining operations, I find nothing in the customs of the High Peak from which I can infer that he will not be entitled also to remove the same buildings at the close of those operations provided he does so within a reasonable time, and before his surface rights have so come to an end, as to make him a trespasser in law by remaining upon the land. The inferences, suggested to my mind by the custom, are all in the opposite direction. By the second custom the landowner's right to take away rubbish from which the lead has been extracted is limited, so that no injury be done (without consent of the barmaster) to the mineral property; which, in the sense of the Act, includes all the works and appurtenances connected with the mine. Under the tenth custom, whatever is the law on this subject as to an ordinary miner, must (I suppose) be equally the law as to the Queen, if working by Her Majesty's own officers, the third mear reserved to the Crown. Under the 19th section the mine may be forfeited, and at the same instant of time may be given by the barmaster to another miner; nor do I see what there is to prevent the barmaster from simultaneously continuing to the succeeding miner, under the fifth custom, the same exclusive surface rights, over exactly the same space of land, which had been enjoyed by the person who incurs the forfeiture. It is not pretended that the succeeding miner is in that case to have the benefit of the buildings erected with his predecessor's money without paying for them; or that the landowner (who is excluded from the use of that part of the surface, and may so continue, as the facts of this case shew, for centuries), is either then to come in and take down these buildings or to receive compensation from the incoming miner for allowing them to remain. The true implication from the fact that they were created by virtue of, and were merely incidental to, a right to the exclusive use of the surface by a person who has ceased to have that right, seems to me rather to be that he not only may, but ought to remove them, if he is required so to do by the person (whether miner or landowner) who succeeds to that right. If not required so to do, he may either make his own terms with the succeeding miner or with the landowner; or, if he thinks it better to abandon than to remove them, he may take that course.

---

(1) 27 L. J. (N.S.) Ch. 474.

(2) 3 East, 38.

In the present case the buildings were, in fact, removed while the defendants remained in possession, no forfeiture having been declared and no conclusive act having been done, shewing any purpose of abandonment, and there being at that time still upon the ground hillocks forming part of the mineral property from which lead might have been extracted. The fifth custom does not say that the miner shall immediately become a trespasser upon the surface when he ceases to work the mine; but only that his right to the exclusive use of it without payment is to be "so long as the mine shall be worked." The 19th custom proves that a forfeiture is not, ipso facto, incurred at the very moment when the working ceases, even when there is such a neglect to work as is, under that custom, a just cause of forfeiture. I cannot hold that at the time when these buildings were removed there had been any such complete abandonment of the mine (in which there was still lead ore, and which had been in work for 200 years), as to make the defendants trespassers. My conclusion, therefore, on the important question raised by the plaintiffs' appeal is the same with that of Lord Coleridge; and I think that the appeal should be dismissed with costs.

Upon the cross appeal I do not consider it necessary to say much. There was no forfeiture declared under the 19th custom; but I think that by pulling down and removing the engine-house, and other buildings necessary for working the mine, and converting the buildings which remained into stables for horses and letting them for purposes unconnected with mining operations, the defendants shewed conclusively their intention to abandon the mine; and that, having done so, they had no longer any right to use the surface land which had been allotted to them under the 5th custom, or to remain in possession of it for other than mining purposes. I think that after that time they have been properly treated as trespassers, and as having abandoned to the landowner the buildings which they neglected to remove while they had the right to do so. I hold that any such removal ought to be either during the continuance of the surface privileges, or at least within a reasonable time after their cessation. The cross appeal, therefore, must also be dismissed with costs.

BAGGALLAY and BRETT, L.JJ., concurred.

Appeals dismissed.

Solicitors for plaintiffs: *Geare & Son.*
Solicitors for defendants: *W. & J. Flower & Nussey.*

J. E. H.

SAXBY *v.* THE GLOUCESTER WAGGON COMPANY.

Patent—Novelty—Combination of existing Inventions.

1881
July 4.

W. N. 89/6

The plaintiff obtained in 1874 a patent for certain improvements in interlocking apparatus for railway points and signals. Patents had been previously obtained in 1870 and 1871 for inventions of apparatus for similar purposes. In an action for infringement of the plaintiff's patent of 1874 by the defendants it was admitted by the plaintiff's witnesses that, taking the two inventions of 1870 and 1871 together, and discarding all superfluous parts, every element of the patent of 1874 was to be found in one or other of those inventions; and that no new result was obtained by their combination in the patent of 1874 different from that which had been obtained by the previous inventions, but it was contended for the plaintiff that the combination of the two inventions of 1870 and 1871, effected by the plaintiff's invention of 1874, required such an exercise of skill and ingenuity as to constitute the subject of a valid patent. There was, however, evidence, with which the Court was satisfied, to shew that any person of ordinary skill and knowledge of the subject, placing the two inventions of 1870 and 1871 side by side, could effect the combination of the two in a manner similar to that of the plaintiff's invention without making any further experiments or obtaining any further information:—

Held, that the plaintiff's invention was not of sufficient novelty to constitute the subject of a valid patent.

Action for infringement of a patent.

The facts and arguments appear from the judgment.

May 10, 11. *Sir J. Holker, Q.C*, *Theo. Aston, Q.C.*, and *Macrory*, for the plaintiff.

Webster, Q.C., *Lawson*, and *R. S. Wright*, for the defendants.

Cur. adv. vult.

July 4. The judgment of the Court (Lord Coleridge, C.J., Field and Bowen, JJ.) was delivered by

Field, J. This is an action brought to recover damages for the infringement by the defendants of letters patent granted to the plaintiff, John Saxby, on the 23rd day of January, 1874; and at the trial before Mr. Justice Hawkins, that learned judge made an order under the Judicature Act of 1873, that all the issues of fact in it should be tried before one of the official referees.

Mr. Anderson accordingly tried those issues, and after a long and careful hearing of the evidence, and examination of the models and drawings, made his report on the 26th of November, 1880.

The invention claimed was described in the specification as capable of being performed in two ways, the second being a modification of the first, and the defendants admitted that they had in fact infringed the invention as firstly described.

They alleged, however, as to it, and also as to the modification:

First. That the inventions claimed were not inventions of improvements.

Secondly. That John Saxby was not the true and first inventor; and

Thirdly. That the inventions claimed were not new.

The objection of want of novelty extended to both branches of the specification, and if well founded is irremediably fatal to the whole of the patent.

The other objection that John Saxby was not the true and first inventor was applicable to the first invention only, and if well founded may possibly be cured as against any subsequent infringements by disclaimer.

Mr. Anderson by his report sustained both objections, and the case was then brought before us upon motion by the plaintiff to set aside or remit to him his report or to enter judgment for the plaintiff, and by the defendants to enter judgment in their favour.

On the argument of the motion we intimated the inclination of our opinion to be that the finding of the learned official referee upon the question of novelty was correct, and ought not to be disturbed, and in that view any further argument upon the second point became irrelevant and was not proceeded with, and as after consideration and comparison of the models and evidence we have arrived upon the question of novelty at the same conclusion as the official referee, we now proceed to give our judgment for the defendants.

The letters patent, in respect of which the action was brought, were granted to the plaintiff Saxby in 1874, and were for an alleged invention of "Improvements in interlocking apparatus for railway points and signals," and the defendants' case was, that the invention claimed had been anticipated by prior patentees, and in particular by the inventor himself in 1871, by William Smith in 1870, and John Imray, in 1872.

It was admitted by both parties that the question to be decided was one of fact, whether or not the invention specified was such a substantial improvement on what had already been known and published as to render it the proper subject of a patent within the rule stated by Lord Westbury in *Spencer* v. *Jack.* (1)

In order to see how this question ought to be answered it should be observed that the inventions brought under discussion, as well those of 1870, 1871, and 1872, as that upon which the present case was founded, were all designed to effect, and did in point of fact, as far as any mechanical contrivance can do so, effect the same substantial object, viz., the prevention of accidents on railways arising from "conflicting signals or improperly arranged switches or points."

This prevention of accidents is sought to be brought about by an apparatus by which the signal or pointsman, for the purpose of making some necessary change in the position of the points or signals, puts in motion a lever (or its catchrod), and by one and the selfsame operation not only effects the alteration which is required to be effected, but also "locks" or renders immovable some other lever, or levers, without the use of which any "conflicting" change in road, or signals, cannot be effected, and sets free all other levers, which after that alteration is effected may be required to be used, and which when the alteration is effected become what may be called "consistent" levers.

In considering the mode in which this is effected it must be borne in mind that the normal condition of a railway, with its main and branch lines, is that the points are so set as that the main line forms a continuous way for the train to pass over, and that the branch line is so disconnected from the main as that no branch train shall be able to come upon the main road.

The connection or disconnection of the road is (as is well-known) effected by movable points which must be moved or set free when any change is required.

The points and the main and branch line signals are also each actuated or set free by means of a separate lever.

---

(1) 11 L. T. (N.S.) 242.

In the normal condition all these levers are set in a frame side by side, so as to be conveniently under the control of the pointsman.

At the time that all these levers are so in their normal position the "road" is "main" and all signals, whether "main" or "branch," are at "danger," so that no train from any direction is at liberty to come into the station until invited to do so by some alteration of the signals.

It is of course, however, essential that the signals which are "consistent" with the safe use of the road should be free to move to "safety," so that such use may be invited, and all the other signals, which in the then state of the road are "conflicting" signals, should be fixed immovably at "danger."

It is also further necessary that the "point" lever itself should be immovable, or "locked," in the position in which it may happen to be when the road is being used, whether for "main" or "branch," and should continue so locked until any necessary change of operations is required, in which case it can only be set free by altering the position of the signal to "danger," and thus rendering the operation of altering the points safe. In other words the "road" and "signals" must be in harmony with each other, and no change should be capable of being effected in the road except by the very act of setting the "danger" signal against the use of it in its altered state.

All these necessary conditions are complied with by the apparatus described in John Saxby's patent of 1874, and are effected by the operation of nine separate parts, which may be roughly divided into such as are part of the "actuating process" and such as form what is (with sufficient accuracy) called the "locking-gear."

It was admitted by the plaintiff that all these nine parts were in 1874 in themselves "old" and that no new result was obtained by their combination in the patent of 1874, different from that which had been obtained by some one or more previous inventor or inventors.

The mode in which these parts are brought into play and used in the patent of 1874 is thus. By grasping the "catch spring" of any one "lever" a "rocker" is actuated so as to communicate motion by means of a jointed "rod" and "link and crank" to a "rocking-shaft," and to cause the latter partially to rotate on its axis, and by that mere grasp all conflicting levers are at once locked. This is effected by the "rotatory" movement of the rocking-shaft having caused a "horizontal sliding bar" (to which a projection on the rocking shaft is connected), to move just so far as to cause a projection on it to come into contact with a solid part of an arm on the "rocking-shaft" of the lever to be locked.

This last rocking-shaft is thus rendered incapable of motion, and as it has a metallic connection to the catch rod of the conflicting lever, a rigid bar is, as it were, formed by means of the two levers, rendering of course the conflicting lever itself immovable.

The operating lever is then pulled over, and at the termination of its movement a further precisely similar operation is effected by which the obstacle is still further carried over in the way of the rocking-shaft and the locking is complete, and the conflicting lever must remain so locked until, if the conflicting lever itself is required to be used, the obstacle is removed, or in other words the lever freed. By the same movement, by which this locking of the "conflicting" lever is effected, other projections on the sliding bar which are obstacles to the movement of the rocking shafts of "consistent" levers in their then position have been moved away from the solid part of the rocking-shaft opposite holes or hollow spaces in the arms of it, so that the rocking-shaft in question has become capable of movement and its lever is free.

By these means any lever whether point or signal can be locked by the same operation which renders its use dangerous, and any signal can be freed by the same operation which renders its invitation safe.

The two operations effected are:—

1st. The formation of this "lever" in use in its then necessary condition and the "conflicting" lever into one solid bar, and

2nd. The dissolution of a similar rigid connection between any lever and its "consistent" lever which it is necessary to have free.

Now the question raised being, whether this "apparatus" was new at the date of Saxby's patent of 1874, it was first of all urged by the defendants that so much of it as consisted of the "actuating process" was substantially identical in parts, principle, and result, with a previous patent of John Saxby of 1871, and it was in effect admitted on the part of the plaintiff that, with the exception of a "link and crank" by means of which the motion was communicated from the rocker to the rocking-shaft, all the elements of this part of the process were to be found in that patent.

It was, however, truly said in answer that the "link and crank" were not to be found in the specifications of 1871, and indeed the official referee found as a fact that it did not appear that there had been any prior combination or union of the parts specified by that means, but it is clear that the use of a link and crank for the purpose of transmitting and changing the direction of motion was a thing well known, and the official referee found, as it seems to us quite rightly, that the combination in this respect in the patent of 1874 might have been executed by any intelligent mechanical workman with no other instructions given to him than those described in the specification of Saxby, 1871, which are as follows: "It may be readily understood that the action of the rocker could be applied to locking-gear of other kinds, the movement of the rocker being communicated by bell cranks, rocking-shafts, or other known means to the various parts of the apparatus which it is intended to set in motion or arrest, the leading principle embodied in my invention being nevertheless maintained in such apparatus."

It was also contended on the part of the plaintiff that a hole which Mr. Saxby pointed out in his evidence in the rocking-shaft of Saxby, 1874, was an addition which constituted a novelty, but the referee considered that to be a mistake, as both in Smith, 1870, and in Imray, 1872, there was a corresponding hole in the rocking-shaft.

Taking, therefore, the "actuating process" by itself, we can see no ground for differing with the official referee in his view, that there was no novelty in that combination sufficient to constitute a patent.

Now, with regard to the residue or passive part of the process, it was urged on the part of the defendants that this portion of the invention had been anticipated by Smith in 1870.

By the apparatus specified by Smith, as in the Saxby's first invention of 1874, the operation of "locking" was effected by the motion of the "lever" itself, instead of the mere grasping of the spring catch of the rod attached to and carried by it, and the mode by which the locking was effected by Smith was shortly thus:—

To the lower portion of the actuating lever was attached a projecting rod, all motion of which in the then position of the apparatus was prevented by the end of it impinging against the solid portion of a "rocking-shaft," in principle similar to that of 1874, whereby a rigid connection was formed between the actuating lever and the rocking-shaft, which rendered the lever immovable so long as the rocking-shaft was so also.

But the rocking-shaft, in its upper portion, had a hole or hollow space of a size corresponding to the size of the projecting end of the rod, and by the action of the operator by pressing with the foot upon the surface of the rocking-shaft the latter was made to rotate partially upon its axis, and thus to depress one arm of the rocking-shaft and bring this hollow space opposite the end of the projecting rod, thus giving the rod free passage and destroying the rigid connection with the lever, and enabling the operator to pull that forward—in other words, to render it free.

This "rocking-shaft" also took into a horizontal sliding bar, identical in principle with that of Saxby of 1874, and the rotation of the rocking-shaft actuated this sliding bar horizontally, so as to bring a projection on it into contact with a solid part of the rocking-shaft of the conflicting lever, so as to prevent any downward motion of it setting free the rod attached to the lever, and thus established a rigid communication with the latter lever, so that it could not be moved. The actuating lever being then pulled over (first description of 1874), caused the rod to pass through the hole in the rocking-shaft, thus fixing that down until the completion of the operation. The lever thus being completely pulled over rendered that position permanent, and the operation of locking that lever was completely performed. But it is also wanted to lock the actuating lever itself, and Smith effected this by the depression of the rocking-shaft of any "consistent lever," on which an arm was fixed connected to an arm upon the rocking-shaft of the "conflicting" lever. The depression of the "consistent" rocking-shaft brought that arm of the "conflicting" rocking-shaft into a hollow space in the projecting rod of that lever, thereby creating a rigid connection between the consistent and conflicting levers, which effectually prevented any motion of the latter, and this was rendered permanent by bringing over the consistent lever and fixing the rocking-shaft and its arm, so that the latter could not be moved.

The mere comparison of these two "locking-gears" seems to us to establish a substantial identity between them; and indeed it was not denied by the witnesses who were called for the plaintiff that taking the two inventions of 1870 and 1871 together, and discarding all superfluous parts, every element of the patent of 1874 was to be found in one or other of those inventions.

The plaintiff's case was therefore reduced to this: that, if the patent of 1874 is capable of being supported, it must be upon the ground that the combination in it of the two inventions of 1870 and 1871 required an exercise of such an amount of skill and ingenuity as to entitle it to the protection of an exclusive grant, and it was to establish this position that the plaintiff's evidence was in the main directed.

But there was also a very large body of evidence to the effect that any person of ordinary knowledge of the subject would, by placing the two inventions side by side, be able to effect the desired combination without making any further experiment or gaining any further information.

Indeed, it was proved to the satisfaction of the official referee that this had in fact been done by a Mr. Harmer, a clerk of Mr. Edwards, who was in the employment of the London and North Western Railway Company, and who in the autumn of 1873 had with ordinary mechanical knowledge, and merely by placing the two inventions side by side, made a drawing known as No. 13, which it was admitted shewed the combination of Smith of 1870 and Saxby of 1871, substantially like Saxby's modification of the inventions.

Taking all these matters into consideration, we are unable to come to the conclusion that the official referee, in thus giving effect to his own views and judgment upon the comparison of the inventions themselves, and having regard to the weight of evidence adduced before him, has erred in coming to the conclusion which he has reported to us.

Indeed, we think that we should have arrived at the same result; and we cannot, therefore, see any sufficient ground for setting aside or remitting his report; and, on the contrary, we feel ourselves obliged to act upon it by giving judgment for the defendants.

We have not thought it necessary to state the effect and results of a comparison of Saxby's invention of 1874 with that of Imray of 1872, which we have carefully made; but we see no reason to doubt that the learned official referee also arrived at a right result in reference to that invention.

Judgment for the defendants.

Solicitors for plaintiff: *Faithfull & Owen.*
Solicitor for defendants: *J. H. Johnson.*

E. L.

PARKYNS *v.* PREIST.

July 4.

Highway—Locomotive—Tricycle—Locomotives Act, 1861 (24 *&* 25 *Vict. c.* 70), ss. 8, 12—*Locomotives Act*, 1865 (28 *&* 29 *Vict. c.* 83), *ss.* 3, 4, 7—*Highways and Locomotives* (*Amendment*) *Act*, 1878 (41 *&* 42 *Vict. c.* 77), *ss.* 28, 29, 38.

A tricycle was capable of being propelled by the feet of the rider, or by steam as an auxiliary, or by steam alone. There was no smoke, nor escape of steam into the air, nor anything to indicate that it was being worked by steam, nor anything which could frighten horses, or cause danger to the public using the highway beyond any ordinary tricycle. The weight was about two hundredweight, and the tires of the wheels about one and a half inches in width. The tires being of india-rubber no injury would be done to the surface of the road by working the machine on it:—

Held, by Lord Coleridge, C.J., Pollock, B., and Manisty, J., that the tricycle was a "locomotive" within the definition in s. 38 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), and was therefore subject to the rules and regulations for the use of locomotives on highways prescribed by ss. 28 and 29 of that Act, by the Locomotives Act, 1861 (24 & 25 Vict. c. 70), s. 12, and the Locomotives Act, 1865 (28 & 29 Vict. c. 83), ss. 3, 4, 7.

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43.

The appellant, Sir Thomas Parkyns, Bart., who was the owner and

1881

PARKYNS *v.* PREIST.

inventor of the motor tricycle, was charged under five summonses: (1.) With being the owner of a locomotive propelled by steam on a public highway, which locomotive was not worked according to the rules and regulations in s. 3 of the Locomotives Act, 1865 (28 & 29 Vict. c. 83) and s. 29 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), which require that "at least three persons shall be employed to drive or conduct such locomotive"; and "one of such persons while the locomotive is in motion shall precede by at least twenty yards the locomotive on foot . . . .":

(2.) With unlawfully driving a locomotive propelled by steam through a town at a greater speed than two miles an hour contrary to s. 4 of the Locomotives Act, 1865:

(3.) With a breach of the Locomotives Act, 1865, s. 7, which requires that "the name and residence of the owner of every locomotive shall be affixed thereto in a conspicuous manner":

(4.) With a breach of the Highways and Locomotives (Amendment) Act, 1878, s. 28, subs. 1, which requires that "a locomotive not drawing any carriage and not exceeding in weight three tons shall have the tires of the wheels thereof not less than three inches in width," and of subs. 4, which requires that "the driving wheels of a locomotive shall be cylindrical and smooth soled . . .":

(5.) With a breach of the Locomotives Act, 1861 (24 & 25 Vict. c. 70), s. 12, which requires that "the weight of every locomotive . . . shall be conspicuously and legibly affixed thereon."

The five summonses were by consent heard together. The facts proved are set out in the judgment. The question for the Court was whether the machine was a locomotive within all or any of the sections referred to.

June 20. *Mellor, Q.C.* (*Channell,* with him), for the appellant. The machine was invented after, and was clearly not contemplated by, the Locomotives Acts, 1861, 1865, and 1878. Those Acts dealt with heavy machines drawing waggons, steam rollers, and the like; such locomotives emit smoke to the annoyance of passengers, or injure roads by their weight: s. 8 of the Act of 1861, and s. 28 of the Act of 1878. The legislature could not have intended that a tricycle should be preceded by a man with a red flag. The definition of "locomotive" in s. 38 of the Act of

1878—"any locomotive propelled by steam or by other than animal power"—must be read with reference to the then state of knowledge. "Propelled by steam" means by steam only, and not (as here) by steam as an auxiliary. If taken literally that definition would include a clockwork engine. In *Taylor* v. *Goodwin* (1) a bicycle was held to be a "carriage" within 5 & 6 Wm. 4, c. 50, s. 78, because the case came within the mischief of that Act, but here it is not so. In *Williams* v. *Ellis* (2) a bicycle was held not to be a carriage. If this tricycle is a nuisance it can be stopped at common law or under the Locomotives Acts.

Leese, for the respondent was not heard.

Cur. adv. vult.

July 4. The judgment of the Court (Lord Coleridge, C.J., Pollock, B., and Manisty, J.) was read (3) by

LORD COLERIDGE, C.J. This is an appeal against the conviction of the appellant by a metropolitan police magistrate under five summonses, whereby the appellant was charged with using a certain locomotive propelled by steam, being a motor tricycle, upon a public highway, without observing the conditions prescribed by s. 3 of the Locomotives Act, 1865 (28 & 29 Vict. c. 83), and s. 29 of the Amending Act of 1878 (41 & 42 Vict. c. 77), and by other enactments. It was admitted before the magistrate and before us, that those conditions had not been observed; and the only question raised for our opinion is whether the machine in question was rightly held by the magistrate to be a locomotive within the meaning of these sections. The first of these provides that "every locomotive propelled by steam or any other than animal power on any turnpike road or public highway, shall be worked" according to certain rules and regulations thereinafter contained. Sect. 29 of the second Act repeals a portion of s. 3 of the first Act, and substitutes another regulation to be observed while the locomotive is in motion, but by s. 38 the word "locomotive" is again defined as meaning "any locomotive propelled by steam or by any other than animal power." The tricycle in question is described in paragraph 8 of the case before us, wherein the evidence of the respondent is set out. He says that he

---

(1) 4 Q. B. D. 228.

(2) 5 Q. B. D. 175.

(3) The judgment was written by Pollock, B.

"saw propelled in the public highway, at the rate of about five miles an hour, a tricycle on which was sitting a man working treadles with his feet in the manner in which tricycles are usually propelled. He noticed some metal boxes under the seat of the vehicle, but when the vehicle passed him he saw no sign of steam and heard no noise. The metal cases contained a small steam engine and boiler and a condensing apparatus, and he saw that the steam was up on the occasion."

On the part of the appellant, Mr. Bateman, an engineer and machinist, was called as a witness. He described the machine as being like an ordinary tricycle, and capable of propulsion in the ordinary way by the feet of the rider, but with auxiliary steam power to assist the rider, which steam power was, however, sufficiently powerful to move the vehicle if desired without the foot motion. In a metal case (size about two feet by two feet by nine inches) placed below the level of the seat and near the feet of the rider is a small copper tubular boiler and an engine. The fuel used is gas evolved from methylated spirit or mineral oil, in the same manner as in the contrivance known as the Whitechapel lamp. There is therefore no smoke, and the exhaust steam instead of being blown off into the atmosphere, producing the puffing noise common to locomotives, is discharged into a coiled pipe in another metal case behind the rider's seat, and is there condensed and returned by a small pump to the boiler as hot water, thus at once economising water and fuel and preventing escape of steam into the atmosphere. The power of the engine was about one horse power indicated, and it was capable of driving the vehicle on a level road at a rate of nearly ten miles an hour, but not more. When the vehicle was so driven there was nothing to indicate that it was being worked by steam power, and nothing which could frighten horses or cause danger to the public using the highway beyond any ordinary tricycle.

The weight of the machine was proved to be about two hundredweight, and the tires of the wheels about an inch and a half in width being similar to bicycle wheels, but somewhat stouter and stronger. The tires being of indiarubber no injury would be done to the surface of the road by working the machine on it.

It was further proved that the machine was fitted with a brake sufficiently powerful to stop the machine in a very few yards against the power of the steam even if it continued working. This was effected by the brake having a powerful leverage, so that a force far less than the force of the steam applied to the brake would nevertheless stop the machine. The brake is also fitted with an automatic action, by which when the weight of the rider is off the seat, the seat rises and thereby applies the brake, so that when there is no person sitting on the seat the brake is applied and prevents the machine moving. The machine is guided by a handle, and can be turned completely round in twice its own length. The boiler is tested to bear a pressure of 700 lbs., and it is habitually worked with a pressure of about 150 lbs. Even if the boiler did burst, being tubular and of copper, the only result would be a rent in one of the tubes, and there would be no explosion.

In answer to questions put to him on behalf of the appellant, Mr. Bateman explained that the principle of the invention was capable of extension to larger carriages, but that the use of india-rubber tires practically limited the weight to something not greatly exceeding the weight of this particular machine, and also that the fuel used could not be used economically to obtain very much greater power than was obtained.

It seems scarcely necessary to do more than to read this description, in order to shew that the tricycle in question comes within the words of the above statutes as being "a locomotive propelled by steam, or any other than animal power." It cannot be less within this description because it is capable of propulsion in the ordinary way by the foot of the rider, it being expressly found in the case that the steam power was sufficiently powerful to move it if desired without the foot motion. It was argued however, on behalf of the appellant, that such a machine could not have been within the contemplation of the framers of the statutes in question, which apparently were intended to be directed against the use of locomotives larger in size and heavier in weight, and therefore more dangerous to persons using the public highway, than the locomotive in question. It is probable that the statutes in question were not pointed against the specific form of locomotive which is described in this case. Indeed, such a locomotive was not known when they were passed, and possibly not contemplated. As, however, it comes within the very words of the statutes, it seems to us that we cannot upon any true ground of construction exclude it from their operation; and it may be observed that even if the fullest scope be given to this argument, Mr. Bateman's explanation that the principle of the invention was capable of extension to larger carriages, would shew that a locomotive similar in construction and principle to that which is the subject-matter of this case might by reason of its size and power become much more dangerous; and if this be so, the question to be considered in each case would not be whether the locomotive in question properly came within the language of the statutes; but whether, by reason of the size or weight of the particular machine, it came within the mischief supposed to be contemplated, which shews that such an argument is vicious.

Two cases were cited by counsel for the appellant; but, in truth, they have no bearing upon the present case. The first was that of *Taylor* v. *Goodwin* (1), in which it was held by this Court that a person riding upon a bicycle on a highway at such a pace as to endanger the life or limb of passengers may be convicted of furiously driving a carriage under the provision of the Highway Act (5 & 6 Wm. 4, c. 50, s. 78). The argument in that case turned wholly upon the meaning of the word "carriage" in that Act, and it gives us no assistance. The second case was that of *Williams* v. *Ellis.* (2) In this case, where a local Turnpike Act imposed a toll upon every horse, mule, or other beast, drawing any coach, sociable, chariot, berlin, &c., it was held that a bicycle was not a carriage liable to toll under the Act. This case was decided upon the ground that the carriages referred to in the statute must be carriages ejusdem generis with the carriages previously specified. This does not appear to us to have any material bearing upon the question now before us.

We think that the decision of the magistrate was correct, and that the conviction should stand with costs.

Conviction affirmed.

Solicitors for appellant: *Milne, Riddle, & Mellor.*

Solicitors for respondent: *Gregory, Rowcliffe, & Co.*

(1) 4 Q. B. D. 228.

(2) 5 Q. B. D. 175.

J. M. M.

[IN THE COURT OF APPEAL.]

1881
May 4.

HAMILTON *v.* CHAINE.
MORGAN, CLAIMANT.

Bill of Sale—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8—*Statement of Consideration—Deduction of Commission on Loan.*

At the execution of a bill of sale expressed to be "in consideration of 700*l.* now in hand paid" a sum of 7*l.* 10*s.* was paid to or retained by the grantee out of the 700*l.* for commission on the loan and expenses in connection therewith in pursuance of a previous arrangement to that effect:—

Held, affirming the decision of the Queen's Bench Division, that the consideration was not truly stated as required by s. 8 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), and that the bill of sale was void.

19 ChD 101
104
— 421, 2-
21 ChD 76,
— 546

APPEAL by the claimant in an interpleader issue from the decision of the Queen's Bench Division on a special case stated on appeal from the Sussex County Court. The facts are fully set out in the report in the Queen's Bench Division. (1)

Petheram, Q.C., and *Gore*, for the claimant. The real meaning of the arrangement between the claimant and Mrs. Chaine was that she was to pay him 7*l.* 10*s.* as commission for the loan. It was in fact a debt, and even if she had declined the loan she could have had an action for the commission according to her agreement. Then, if so, *Ex parte Challinor, In re Rogers* (2), and *Ex parte National Mercantile Bank, In re Haynes* (3) shew that, applying the money advanced in discharge of the debts of the grantor, does not prevent the real consideration for giving the bill of sale from being the money advanced. The case of *Ex parte Charing Cross Advance and Deposit Bank, In re Parker* (4), which is relied on by the other side, is distinguishable, for though the deduction of a sum for interest was there held to make the statement of the consideration bad, there was no previous agreement to pay the interest in advance, and as interest was not due the sum deducted was not therefore for a debt.

R. T. Reid, for the defendant, the execution creditor, was not called on.

---

(1) Ante, p. 1.
(2) 16 Ch. D. 260.
(3) 15 Ch. D. 42.
(4) 16 Ch. D. 35.

BRAMWELL, L.J. I am of opinion that this appeal should be dismissed. The agreement was that 700*l.* should be said to be lent by the claimant to Mrs. Chaine, but that in truth she should not have that sum, but only 692*l.* 10*s.* The case, therefore, is not capable of the ingenious argument which has been raised, that there was an agreement to lend 700*l.*, and that a debt of 7*l.* 10*s.* should be paid out of it. The substance of the transaction was that the deed should represent that a sum of 700*l.* was advanced and lent by the grantee, whereas that sum was never in fact advanced, but only 692*l.* 10*s.*, the 7*l.* 10s. being retained by the grantee for what is called commission and expenses. The case is, therefore, distinguishable from that of *Ex parte National Mercantile Bank, In re Haynes* (1), and the bill of sale is void because the consideration is not truly stated. It is not because there has been any fraud, but because people will not always tell the actual truth. If they had done so in this case there would have been no objection to the transaction nor any difficulty in the matter, and the deed would have been good.

BRETT, L.J. The agreement was that it should be made to appear in the bill of sale that the consideration for giving it was 700*l.*, whilst it was never intended that that sum should be advanced, but something less. This agreement was not outside the agreement for the loan, but it was part of that agreement itself. It may be that it was part of such agreement that a cheque should be drawn for the balance of the 700*l.* after the 271*l.* had been previously paid, but it was also part of the agreement that the proceeds of that cheque should not be retained by the borrower but that 7*l.* 10*l.* thereof should be given to the lender. It is said that the case is like that of *Ex parte Challinor, In re Rogers* (2), where part of the sum stated as the consideration was deducted for costs. I do not think that it is like that case. If it had been I should have been bound to have decided in accordance with it, though mentally not agreeing with it. I may add, also, that had I been a party to the decision in *Ex parte National Bank, In re Haynes* (1), I should have had the extreme doubt which Lord Justice Bramwell stated he had in that case.

(1) 15 Ch. D. 42.

(2) 16 Ch. D. 260.

1881

HAMILTON
v.
CHAINE.

COTTON, L.J. As I understand the facts of this case the grantee of the bill of sale never was to be a lender of 700*l.*, for 7*l.* 10*s.* was to be retained by him out of it. I think that is so, because with respect to the 10*l.* for the same thing, namely, commission and expenses, a promissory note was given by the borrower. Therefore the 7*l.* 10*s.* was not to be paid afterwards by the borrower, but was to be retained by the lender out of the money as a commission to him for the loan itself. It is different from the case of *Ex parte National Mercantile Bank, In re Haynes* (1), where part of the money stated as the consideration was retained for a debt for which the borrower was liable. It is said, however, that the case is governed by that of *Ex parte Challinor, In re Rogers* (2), where the lender, who was a solicitor, retained 40*l.* out of the 560*l.* stated in the bill of sale as the consideration for it, in payment of his costs of preparing the deed and of other costs due to him from the borrower. That case is, however, distinguishable from the present one, because the sum so retained there was for work done by him for which he could have claimed to have been paid if there had been no advance or loan. Still I must say that though I was a party agreeing to the decision in that case, I did so agree with hesitation, and because of the decision in *Ex parte National Mercantile Bank, In re Haynes* (1), where it was held that the deduction of such a debt might be part of the loan. I think that what was said by Bacon, V.C., in *Ex parte Carter* (3) as to the object of the Act is applicable here, namely, that it "was to endeavour to have a stop put as far as practicable to the fraudulent practices of lenders of money," for deductions for interest and commission are to make the borrower pay something further for the advance.

Appeal dismissed.

Solicitors for claimant: *Venn & Woodcock.*
Solicitors for defendant: *Nash & Field.*

(1) 15 Ch. D. 42. (2) 16 Ch. D. 260.
(3) 12 Ch. D. 908.

W. P.

1881
April 9.

[IN THE COURT OF APPEAL.]

CORRY *v.* THE GREAT WESTERN RAILWAY COMPANY.

Railway Company—Liability to fence against adjoining Lands—Railway Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), s. 68*—Injury to Cattle—Owner releasing Right to accommodation Works—Rights of Occupier.*

The plaintiff in 1846 became tenant from year to year of land belonging to one G. In 1847 the defendants, a railway company, acquired part of the land in the exercise of their statutory powers, and by arrangement with G. paid him compensation in lieu of all accommodation works, including the right to have his land fenced from the railway, G. releasing the defendants from their statutory obligation in that respect. The defendants, however, made a fence of posts and rails between the land so occupied by the plaintiff and a ditch in the defendant's land adjoining the railway, and they planted a hedge on the side of the ditch nearest the railway itself, sufficient to prevent animals from straying thereon. They, however, neglected to keep up the posts and rails, and in consequence of their neglect to do so a cow belonging to the plaintiff, in 1879, whilst the plaintiff so continued in the occupation of the land under the original tenancy which had never been determined, fell into the ditch and was killed:—

Held, affirming the decision of the Common Pleas Division, that the defendants were liable for the loss of the cow, for that their arrangement with the owner did not exonerate them from their liability under the Railway Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 68, to maintain the fence for the benefit of the occupier, and so as to prevent his cattle from straying from his land.

Appeal by the defendants from the judgment of the Common Pleas Division, on a case stated by the judge of the Yeovil county court (reported 6 Q. B. D. 237, where the case is set out). The facts are shortly these: The plaintiff is yearly tenant to one John Goodden, of a farm, one of the fields of which abuts on lands belonging to the defendants, and through which is the defendants' railway. Between the field of the plaintiff and the lands of the defendants there exists a ditch which was made by the defendants at the time of the construction of their railway in or about 1846. When they made the ditch they erected a post and rail fence between it and the field of the plaintiff, and they planted on the side of the ditch nearest the railway a thorn hedge, which is now a sufficient fence to prevent animals from straying on the railway itself. After this hedge had grown up, the defendants neglected to keep up the post and rail fence, and it has ceased to exist for many years, and in consequence of such neglect to fence the ditch from the plaintiff's field, a cow of the plaintiff's fell into the ditch in July, 1879, and was killed. The action was brought in the county court to recover 30*l.* damages for the loss of this cow, and the county court judge gave a verdict and judgment for the plaintiff for that amount. It appeared that in the conveyance to the defendants (the railway company) in December, 1846, of the land required for the railway at the place in question, the grantors, including the said J. Goodden (the plaintiff's landlord), declared that the sum paid by the said company was not only in full satisfaction for the value of the hereditaments conveyed and for any damage sustained by the severing of the lands, but also "for all right, title, or claim to have any posts, rails, hedges, ditches, mounds, or other fences or works made or maintained by the company for separating the lands taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass or the cattle of the owners or occupiers thereof from straying thereout." Prior to and at the time of such conveyance to the company the plaintiff, who was no party to such conveyance, was such yearly tenant as aforesaid of the farm to the said J. Goodden, and he has continued to occupy the same on the same terms down to the present time.

The Common Pleas Division affirmed the judgment for the plaintiff which the county court judge had given, but gave the defendants leave to appeal.

The defendants appealed.

R. S. Wright, for the defendants. The obligation of the railway company to make accommodation works for the occupiers of lands adjoining the railway is imposed by s. 68 of 8 & 9 Vict. c. 20 (1), and by the proviso at the end of this section the company are relieved from making such works with respect to which the owners and occupiers have been paid compensation instead of making them.

---

(1) The 68th section enacts that "the company shall make, and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say" (amongst others) "sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken and protecting such lands from trespass, or the cattle of the owners or the occupiers thereof from straying thereout by reason of the railway," &c. "Provided always, that the company shall not be required to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them."

The question is as to the duration of the company's obligation to make and maintain such works for a yearly occupier, whose landlord has been compensated and has expressly released the company from making or maintaining the same. It may be that the landlord, by being compensated, has undertaken to make and maintain these fences, and that the occupier must look to him, but at all events a yearly tenant has only a year's, or at most a two years', interest in the land. In the opinion of Lord Hatherley, when Vice-Chancellor, in the case of *Cattley* v. *Arnold* (1), he has "a lease for a year with a growing interest during every year thereafter, springing out of the original contract and parcel of it." Had the company been dealing with the interest of the plaintiff in taking the land compulsorily under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), the sections from 119 to 122 shew that they would at most have been obliged to compensate him for one or two years, and though *Rogers* v. *Kingston-upon-Hull Docks Co.* (2) is an instance in which such a tenant has been considered to have had an equitable interest for something more than a year, it is plain that the railway company, when they acquired the land in 1846, were not bound to provide a fence for the plaintiff for a longer period than two years, and certainly there was no liability on their part that would extend beyond the time which the post and rail fence they had erected in fact lasted. Suppose the plaintiff had been only a weekly tenant (and the case of *Reg.* v. *Inhabitants of Thornton* (3) is an authority that the continuance of a weekly tenancy is governed by the same principle as that of a yearly tenancy) it surely could not have been said that the defendants, after they had bought up the landlord's interest, would have been bound for all these years to have maintained this fence for the plaintiff.

Petheram, Q.C., for the plaintiff. The plaintiff was the tenant of John Goodden of this land at the time of the conveyance to the

(1) 1 J. & H. 651; 28 L. J. (Ch.) 352. 5 Jur NS 361
(2) 34 L. J. (Ch.) 165.
(3) 2 E. & E. 788; 29 L. J. (M.C.) 162.

defendants of the land for their railway, and the tenancy which then existed has ever since continued, so that the estate of John Goodden in the land has always been in reversion. Then the plaintiff was no party to the deed, and no compensation was given to him for his interest. Now, by s. 68 of 8 & 9 Vict. c. 20, the defendants were bound to make and maintain certain works, which would include the fence in question, "for," as the section says, "the accommodation of the owners and occupiers of lands adjoining the railway," and the plaintiff being such occupier could, either by mandamus or by going before the justices, have compelled the defendants to erect this fence. It is said that the defendants were not bound to maintain it for more than two years, but that would have been only if they had got the plaintiff's landlord to determine his tenancy; but they did not do so, and if the plaintiff was entitled to have this fence made in 1846 he is equally entitled to have it now. He has never contracted himself out of that right or received any compensation for it, and it is not even a right for which the defendants had any power to compel him to accept compensation, or to release.

R. S. Wright, in reply.

Cur. adv. vult.

April 9. BRAMWELL, L.J. I think this judgment must be affirmed. The plaintiff was an occupier with a right to have a fence between his land and that of the railway company, and his tenancy and his right under it to have such fence have continued, as it seems to me, to the present time. It is conceded that if he had a lease, say for fifty years, though determinable at six months' notice, he would have had this right. He had not such lease, but was tenant only from year to year, determinable at six months' notice. But still the tenancy is the same, and his right against the landlord is the same. His landlord cannot be taken to have given up any right which the plaintiff had as his tenant, and I think there would be a hardship upon the plaintiff if it were otherwise, because he, the plaintiff, was no party to the agreement by which his landlord gave up the right to fencing. His landlord did not choose to give him notice to quit, and the defendants did not stipulate that the landlord should do so. Then the plaintiff must be taken to have given up this right either without any compensation at all, which would be unreasonable, or else it must be said it was his own fault if he had none, because he might have given notice to quit; but he might say, "I do not want to give notice to quit, I prefer being where I am; and yet that is no reason why I should be there on worse terms." It seems to me that the law is on his side, and that there is some reason in it. Mr. Wright contended that it was hard on the company in the case of a tenant from year to year. The company, under the statutes, would compensate him upon the footing that his interest was for one year only, or, at all events, for not more than two years, and therefore if these defendants had purchased this right of the tenant they would not have had to give him above two years' purchase for it, and during those two years they have in fact fenced the land. That is true. I agree that, on the one hand, there is some plausibility in saying that it is a hard case upon the plaintiff, and that, on the other hand, there is some plausibility, perhaps more, for saying it is a hard case upon the defendants; but we must see what the law is, and that is in favour of the plaintiff.

BAGGALLAY, L.J. I agree with Mr. Justice Lindley in thinking this a case not altogether free from difficulty. As I apprehend the facts of the case, the ditch and the land between the ditch and the quickset hedge, became the property of the railway company at the time the railway was constructed. They not only had that portion of the land on which the railway was made, but they had the land on the farther side of the ditch. It therefore became their duty under s. 68 of the Railway Clauses Act (8 & 9 Vict. c. 20), to make and maintain a sufficient fence between that portion of the land which they acquired and the land adjoining it; but then the same section contains a proviso that they "shall not be required to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive, and shall have been paid, compensation instead of the making them."

Now, in this case, it would appear from one of the deeds, that an agreement was come to with the owner of the lands, which in effect deprived him of the right of insisting upon either the original making or the maintaining of any such fence as this; and the question we have to determine is, whether he, the owner having made that agreement, and the plaintiff being at the time only a tenant from year to year, the tenant can insist upon the maintenance of that fence. It may be that at the time the purchase was made the plaintiff was interested in the land actually taken, and in estimating its value the valuation was based upon the consideration that his tenancy was only from year to year. But it does not appear to me the same thing when one considers what the plaintiff's rights are as regards the remainder of the land. So far as regards the land taken his tenancy was put an end to; so far as regards the land which was not taken it appears to me his tenancy has continued ever since a tenancy from year to year, and not a new tenancy commencing every year. No doubt it would have been in the power of the railway company to have required such tenancy to be put an end to. If that had been done I should have agreed with Mr. Wright, that a person who acquired a fresh tenancy after the owner had given up his right to the accommodation works, could not enforce such a demand as is made by the plaintiff in the present action; but, in my opinion, although this is only a tenancy from year to year, it continues until it is properly determined, and it never having been determined, I think the plaintiff is entitled to succeed. The judgment of the Court below must therefore be affirmed.

LUSH, L.J. The plaintiff was the occupier of land adjoining land of the railway company, and there was no fence between his land and the company's ditch. The action is brought for the loss of a cow which came to its death by straying from the plaintiff's land and falling into the ditch. Now, if the land ought to have been fenced by the railway company then it is clear the company are liable for the loss of the cow.

That brings us to the question was the railway company under an obligation to make and maintain a fence so as to prevent the straying of cattle, and that turns entirely upon s. 68 of the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20). That section says, "The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway," and after enumerating many of such things, it goes on, "also sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining land, not taken, and protecting such lands from trespass or the cattle of the owners or occupiers thereof from straying thereout." That is the obligation imposed by the section. Then there comes a proviso that "the company shall not be required to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive, and shall have been paid compensation instead of the making them." Now, in this case, compensation had been made to the owner, but no compensation had been made to the occupier. Therefore, as regards the occupier, the company are entirely out of the proviso, and the enactment is in full force which says they "shall make and maintain for the benefit of the occupier such sufficient fence for protecting his lands from trespass and his cattle from straying thereout." It appears to me, therefore, there is an end to the question. If they had proposed to make compensation to the occupier, or, if they now do, because I do not see why they might not at this very time do so, there would arise the question what is the measure of the interest which he is supposed to have as tenant from year to year. That is a question as I read it, which under s. 121 of the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), would have to be decided by two justices having regard to all the circumstances. Whether they would think it right to look upon him as a tenant for one year, or two years, or more, seems to me entirely in their discretion. But the railway company have never taken any steps towards making any compensation to him, and they are liable for not having made and maintained the fence. That being so, the ordinary rule of law applies. The loss of the cow was through the want of a fence which they were bound to maintain, and not having maintained it, they are responsible for the loss.

Appeal dismissed.

Solicitors for plaintiff: *Warry, Robins, & Burges, for Ffooks Sherborne, Dorset.*

Solicitor for defendants: *R. R. Nelson.*

W. P.

[IN THE COURT OF APPEAL.]

1881
June 30.

POYSER *v.* MINORS.

Practice—Judgment of Nonsuit—Order XVI., rule 17 *of County Court Orders,* 1875—*Authority to make such Rule—County Courts Act,* 1856 (19 *&* 20 *Vict.* c. 108), *s.* 32.

By Order XVI., rule 17 of County Court Orders, 1875, "any judgment of nonsuit, unless the judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant." Such rule is a copy of Order XLI., rule 6 of the Judicature Orders, and was made by a committee of county court judges with the approval of the Lord Chancellor under the authority of s. 32 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), which authorizes such county court judges with such approval to frame rules and orders "for regulating the practice of the Courts and forms of proceedings therein:"—

Held, that unless rule 17 of the County Court Orders was ultrà vires a judgment of nonsuit in a county court not appealed against nor set aside, was a bar to an action by the plaintiff for the same debt in the superior Court.

Held, also (Bramwell, L.J., dissenting), that rule 17 was not ultrà vires but was covered by the authority given to the committee of county court judges by the County Courts Act, 1856, s. 32.

Appeal by the defendant from the judgment of A. Wills, Q.C., sitting as commissioner at Shrewsbury at the last spring assizes.

The facts are fully stated in the judgment of Lush, L.J. The main question was whether Order XVI., rule 17 of County Court Orders, 1875, which states that "any judgment of nonsuit, unless the judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant" was or was not ultrà vires.

Jelf, Q.C., and *Archibald*, for the defendant.

Bosanquet and *Darling*, for the plaintiff.

The case *Re King* v. *Hawkesworth* (1) was cited.

Cur. adv. vult.

June 30. Lush, L.J. This action is brought to recover 37*l.* 2*s.* for goods sold and delivered. The writ is dated the 11th of January, 1881.

---

(1) 4 Q. B. D. 371.

But see now the Supreme Court of Judicature Act 1881 (44 & 45 Vict c 68) s. 27.

The material ground of defence was that on the 5th of May, 1880, the plaintiff sued the defendant in the county court of Lichfield for the same debt, and that in that action judgment of nonsuit was given against him, which judgment remained in force.

At the trial of this action in the Court below, a certified copy of the entry in the minute book of judgments in the county court was put in evidence, and from this it appeared that the plaintiff was represented at the trial by counsel, and the defendant by his solicitor; that judgment of nonsuit was given with costs, but accompanied with an order that such judgment was not to be a bar to a re-entry of the cause for trial.

No application to re-enter the cause pursuant to such leave, or to set aside the nonsuit as irregular, was made until long after the time limited for that purpose by the Consolidated County Court orders, so that the nonsuit has, according to the terms of Order XVI. rule 17 of those orders, the same effect as a judgment for the defendant upon the merits: that is it is a bar to this action. When the plaint was entered in the county court and the summons applied for, nothing was said to the registrar to the effect that the plaintiff was out of the country, consequently no security for costs was given or required, but the summons was given out as to an ordinary suitor residing in England at the time, whereas, in fact, the plaintiff had gone to America to reside and had left his wife to wind up his affairs. The fourth of the consolidated orders, rule 2, prohibits the summons being issued under such circumstances, until security for costs has been given either by a deposit of money or otherwise, or the undertaking of a solicitor to see them paid.

When it was disclosed at the trial that the plaintiff was out of the country, and security had not been given, the learned judge of the county court considered that he had no alternative but to non-suit the plaintiff, but he reserved leave to re-enter the cause upon security being given. No further step was taken by the plaintiff in the county court, but eight months afterwards this action was brought. The learned judge who tried this action and whose judgment we are called on to review, held that the nonsuit mentioned in the rule in question was a nonsuit on the merits, and that although the failure to give security for costs might be a good reason why that action should fail, it was not a bar to this action; and he gave judgment for the plaintiff but stayed execution for a time to give an opportunity of appealing.

We are unable to agree with the learned judge in his construction of the rule. It does not in any way suggest that any inquiry is open as to the ground on which the nonsuit proceeded, or whether the plaintiff was rightly nonsuited or not. The words are "any judgment of nonsuit, unless the judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant." We think we cannot go behind the record. The judgment, if erroneous, stands on the same footing as an erroneous judgment for the defendant, and should have been appealed against or set aside in the county court. As nothing was done to test its validity, we think it cannot now be impeached.

On the argument before us a new point was started, and this ultimately became the point mainly relied on. It was that the County Court Order XVI. rule 17, was ultrà vires, and that supposing that to be out of the way the plaintiff was only exercising his common law right in bringing a second action. We reserved our judgment in order to look into the statutes under and in connection with which the Consolidated County Court orders were made.

These orders were issued in 1875 and supplemented in 1876. Many of them were taken from the orders which were framed under the Judicature Act, 1873, and which were incorporated into the Judicature Act, 1875. The rule in question is a copy of rule 6 of the 41st of such orders, and, like many others of the consolidated orders it was intended to assimilate the practice of the county courts to that of the High Court, they were framed by a committee of county court judges appointed by the Lord Chancellor under the County Courts Act, 1856. The words of s. 32 of that Act are: "The Lord Chancellor may appoint five county court judges, and from time to time fill up any vacancies in their number, to frame rules and orders for regulating the practice of the Courts, and forms of proceedings therein and from time to time to amend such rules, orders, and forms; and such rules, orders and forms, or amended rules, orders, and forms certified under the hands of such judges, or any three or more of them, shall be submitted to the Lord Chancellor, who may allow, or disallow, or alter the same; and the rules, orders, and forms, or amended rules, orders, and forms so allowed or altered, shall from a day to be named by the Lord Chancellor, be in force in every county court." The five judges unanimously certified the rules, and the Lord Chancellor certified his approval of them, and directed them to come into force on the 2nd of November, 1875, being the day after that on which the Judicature Acts came into operation.

A nonsuit at common law was nothing more than a declaration by the Court that the plaintiff had made default in appearing at the trial to prosecute his suit. The entry on the postea was that "the said A. B., being solemnly called comes not, nor does he further prosecute his suit against the said C. D." It decided nothing as regards the matters in dispute, but merely got rid of the pending action, leaving the plaintiff at liberty to begin de novo, and this he might have done either in the same or different court, subject only to having the proceedings stayed till he had paid the costs taxed against him on the nonsuit. The first County Court Act, 9 & 10 Vict. c. 95, authorized the Court to nonsuit the plaintiff or to give judgment for the defendant if the plaintiff should appear and not make proof of his demand to the satisfaction of the Court, and in either case to award costs (s. 79), and s. 89 says that every order and judgment "shall be final and conclusive between the parties, but the judge shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or defendant to the judgment of the Court." A nonsuit under these sections would undoubtedly have left the plaintiff at liberty to bring another action.

The rule in question puts a restriction upon this liberty and subjects it to the discretion of the judge to be exercised at the time when he pronounces judgment of nonsuit. "Any judgment of nonsuit, *unless the judge otherwise directs* shall have the same effect as a judgment upon the merits for the defendant," but when he does not otherwise direct, the rule goes on to declare that he may set aside the nonsuit "in any case of mistake, surprise, or accident," words large enough to embrace every contingency to which the failure may be attributed which reasonably entitles the plaintiff to have the validity of his demand effectually tried. It is more beneficial to both parties to have a second trial in the same action than to waste the costs already incurred and begin the litigation de novo.

Is a rule which has this effect covered by the authority given to the committee of judges by the Act of 1856, "To frame rules and orders for regulating the practice of the Courts and forms of proceedings therein?" This is the question we have to decide, and although we are not precluded from forming our own opinion by the consideration that these rules were framed by five judges of great experience and deliberately and formally adopted by the Lord Chancellor, and that they have been accepted and acted upon in all the county courts in England for more than five years without any such objection having been taken before, we are bound to form our own opinion, notwithstanding we cannot but hold that these considerations ought to have great weight, and that nothing short of strong conviction that the Act has been strained, and that it will not bear such a construction, would justify us in declaring the rule to be ultrà vires.

After the best consideration I can give to the case I am not only not convinced that the Act has been misconstrued, but am of opinion that the Lord Chancellor and the learned judges were right in the view which they have taken of their authority under the Act of 1856.

"Practice" in its larger sense—the sense in which it was obviously used in that Act, like "procedure" which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from its product.

"Practice," and "procedure," as applied to this subject, I take to be convertible terms.

The rule in question is, as I before observed, a copy of Order XLI., rule 6, of the Rules of Court, which were framed by the Judges under the Judicature Act of 1873, and adopted as part of the Act of 1875. The particular rule was originally in the schedule to and formed part of the Act of 1873. (1) How is it regarded in that statute? Is it regarded as a matter of practice or something higher in the nature of substantive law?

The 69th section which declares the rules in the schedule to be part of the Act, says "as to all matters to which they extend" these rules shall "regulate the proceedings in the High Court, unless and until by the authority hereinafter provided any of them may be altered or varied, but such rules" "shall for all the purposes of this Act be Rules of Court, capable of being annulled or altered by the same authority by which any other Rules of Court may be made, altered, or annulled, after the commencement of this Act."

The authority referred to is contained in the 74th section, by which the Supreme Court may "alter or annul any Rules of Court for the time being in force, or make any new Rules of Court for the purpose of regulating all such matters of practice and procedure in the Supreme Court, or relating to the suitors or officers of the said court or otherwise, as under the provisions of this Act are or may be regulated by Rules of Court," and by the 68th section Rules of Court may be made for (amongst other other things) "the regulation of any matters relating to the practice and procedure of the said Courts respectively" (the High Court and Court of Appeal).

In these sections the rules in the schedule are regarded as Rules of Court for regulating its practice and procedure, and apart from statutory restriction such rules are within the competence of any Court to make for itself.

Rules of substantive law which the Court has to administer are enacted and declared in the body of the Act, and these are by the 91st section to be "in force and receive effect in all Courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognisable by such Courts." But the schedule is headed "Rules of Procedure," and these are rules for regulating the practice of the High Court only, and would not by virtue of that Act be applicable to county courts. If, therefore, the practice was to be uniform, it was necessary to frame rules for the county courts in order to make it so. Surely it is highly expedient that Courts administering the same law, whose jurisdiction is in the main concurrent as far as it extends with that of the High Court, should so far as practicable, having regard to their more limited jurisdiction, be guided by the same rules of practice; and I cannot help thinking that if it had been thought that "Rules for Regulating the Practice of the County Courts," in the Act of 1856 meant something different from that of "Rules of Procedure," in the Judicature Act of 1873, a further authority would have been given either in one of the Judicature Acts or some later County Court Act.

---

(1) See end of rule 46 in Schedule to the Judicature Act of 1873 (36 & 37 Vict. c. 66).

Turning to the 46th article (1), we find additional proof that the rule in question was regarded as a rule of "Practice." It is there associated with others which come within the narrowest and most technical definition of "practice," the whole article forming a wholesome provision for putting an end to vexatious and capricious proceeding by which litigation was often needlessly prolonged and rendered needlessly oppressive.

That article forbids a plaintiff, first, from discontinuing his action without leave of the Court if he has taken any step after delivery of the statement of defence. Secondly, from withdrawing the record without such leave, and thirdly, from bringing a second action for the same cause after being nonsuited, except when leave to do so was given him, and compelling him, instead of resorting to this expedient, to apply to set aside the nonsuit, and proceed to a second trial in the same action. This latter purpose is expressed by the rule in question.

And lastly, the same article forbids the defendant from withdrawing this defence in whole or in part without leave. If the judges of the county courts had not the power to adopt these wholesome rules, they certainly ought to have had it, and, as I before observed, I cannot help thinking it would have been given them if it had been considered to be wanting.

---

(1) See rule 46 in Schedule to the Judicature Act of 1873 (36 & 37 Vict. c. 66).

For these reasons I am of opinion that this objection also fails, and that the judgment of the Court below must be reversed, and judgment given for the defendant with costs, both in this Court and the Court below.

BAGGALLAY, L.J. I agree in the judgment of Lord Justice Lush.

BRAMWELL, L.J. I have very great difficulty in this case. My Brother Lush has favoured me with his judgment. I quite agree with him, with all respect to the learned judge before whom the case was tried, that the judgment cannot be supported on the ground on which it was given, and it must be reversed, unless the County Court Rule, Order XVI. rule 17, was ultrà vires of those who made it. In considering whether it was, one must consider to some extent Order XLI. rule 6, of the Judicature Orders. This rule has always been a difficulty to me. It supposes a "judgment of nonsuit" may be given. There really in strictness never was a "judgment" of nonsuit. No plaintiff could be nonsuited against his will. He failed to appear at the appointed time, generally at Nisi Prius—(I believe there were other stages of a cause in which there might be nonsuits)—and his non-appearance was recorded, returned to the Court in banc, and then judgment was given against him that the defendant go without a day, &c. The same judgment, as in many other cases, a judgment consequent on his not prosecuting his action, a judgment because he was nonsuited. If he insisted on appearing he could not be nonsuited. The expression there "judgment of nonsuit," seems inaccurate. But setting aside this difficulty, which were it necessary I could show is not merely verbal, I have never been able to see when, under the other rules, a nonsuit can happen. I need not discuss nonsuit before trial. None are provided for by the rules. Now what is to happen at the trial. By Order XXXVI. rule 18, "if plaintiff appears and defendant does not appear then plaintiff may prove his claim." What is to happen if he does not is not said. I should have thought verdict and judgment for defendant if the case was before a jury, judgment for him if not. Was it contemplated that a Vice-Chancellor should nonsuit? Suppose plaintiff insists on appearing? What is the use of a nonsuit if it is a bar to a future action, unless ordered to the contrary. And if it may be, and is, why could not the power be given to the judge or Court to say that any judgment of whatever kind should not be a bar if so ordered. However, it might be said that this was the object of the rule, and that under the former rule 22 of that Order, by which the judge may give judgment for plaintiff or defendant, or "enter any other judgment," the judge could give "judgment of nonsuit." But that rule 22 is repealed, and in lieu of it is a rule that the judge may "direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment." This does not seem to authorize "judgment of nonsuit," which is not a judgment for the defendant, save that it is against the plaintiff. Rule 18 seems the only one under which such a judgment can be given. The judgment when defendant appears is provided for by rule 19 and rule 22, now 22a. It seems strange that such a judgment can be given only where the plaintiff appears and defendant does not. I cannot but doubt whether rule 6 of Order XLI. did not slip in per incuriam, and whether it can be applied now especially. However, there it is, and has been acted on, and probably would be supported, if possible. I should have thought it ultrà vires, except that it is embodied in a statute. Still, however doubtful the parentage, there is its offspring, the county court rule which I must now consider.

I quite agree with my Brother Lush that the question is the county court rule, which is under consideration, covered by the authority "to frame rules and orders for regulating the practice of the courts and forms of proceedings therein." I need hardly say that I quite agree with him that it is strongly in favour of the validity of such a rule, that it was framed by five learned county court judges and passed by the Lord Chancellor, and that it has been in universal operation, unchallenged; (this would weigh with much greater weight if I knew that the rule had been made and certified after consideration of the question now before us, but probably it was not; probably the judicature rule was simply adopted:) further, that it assimilates the county court practice to that of the High Court, if indeed Order XLI. rule 6, is operative. But this is certain, unless this rule could have been validly made on the passing of the Act of 1856, it could not be validly made when it was, nor would it have been tolerated in 1856. My difficulty is to see how, if it operates as contended, it is a rule of procedure or practice: how it is a rule which does no more than regulate "the practice of the courts and forms of proceedings therein." I have already made some remarks on nonsuits. I agree with what my Brother Lush says. But for and until this rule the judgment of nonsuit authorised by the first County Court Act, 9 & 10 Vict. c. 95, would not have precluded a second action. It would have been no bar to a second action. Why? Why was not a nonsuit in actions in the inferior courts a bar to a second action? Because there was no judgment on the matter in dispute; because the matter was not res judicata; because the maxim nemo debet bis vexari pro eâdem causâ did not apply. The same thing was true of a second action after a discontinuance. It was even true when there was a verdict, unless he was bound by the judgment as when the judgment was "quod (defendant) eat inde sine die, &c., et non quod querens nihil capiat per breve:" Cro. James, 284. To be bound, a plaintiff must have had judgment against him on demurrer, verdict, or confession, and in bar of his right. This is a rule of law consequent on such judgment, and to give such an effect to a judgment of nonsuit is to alter the law, and with all submission, to alter it anomalously, and to give an arbitrary effect to a proceeding, which effect is without principle. I cannot agree then with my Brother Lush that all that the rule does "is to put a restriction on this liberty," viz., of bringing a second action, and subject it to the discretion of the judge. The rule takes away his right in law. I do agree with his distinction between practice to enforce a right and the law which gives and defines the right. But then I ask whether it is not the case that a man has a right of action which the law says he shall not have by bringing an action and being nonsuited, but these rules say he shall lose thereby. I agree, also, that the Judicature Orders treat this as a matter of practice; but with all respect to those rules I cannot think that any implication therefrom can reverse a rule of known existence, and of which the reason and principle are known. It was perfectly competent to those who framed the rules under the Judicature Act, even without a statutory effect being given, to say there should be no discontinuance, no withdrawing the record, &c., and they might have said there should be no nonsuit. They might have added that any nonsuit might be set aside, and so have made it like what Order XLI. rule 6, says it is, to this extent at least, that the action might be resumed in the same court. It may be said that if this can be done why cannot they do what they have done. I say it is not the same thing. They have made a nonsuit a bar to a second action in the same or any other Court. They have altered the law of the land. I think this was ultrà vires, and that, therefore, the judgment must be affirmed.

Judgment reversed.

Solicitors for plaintiff: *Ashurst, Morris, Crisp & Co.*
Solicitors for defendant: *Jennings & Burton.*

W. P.

1881
July 4.

HARRIS *v.* TRUMAN AND OTHERS.

Trustee—Trust Funds misapplied, following Proceeds of—Moneys held in a Fiduciary Character—Advances for Particular Purpose misappropriated—Agent—False Representation—Property, passing of—Reputed Ownership—Trustee in Bankruptcy takes Property subject to same Equities as Bankrupt.

9QBD265

The defendants were brewers, and employed F. as their "malting agent." The regular course of business between the defendants and F. was as follows:

F. occupied the malting premises, and took out the necessary licenses. It was his duty to buy barley in his own name as principal for cash, to send in to the defendants certain periodical accounts of the barley so bought from time to time and the prices of the same, to submit samples to the defendants, and if the barley was approved of by them to malt it and deliver the malt to the defendants, receiving a commission upon the quantity of barley steeped. The quantity of malt required by large brewers being very great, the brewer, and not the malting agent, provides the capital for the purchase of the barley. In the present case the defendants kept accounts at certain provincial banks, upon which F. was empowered to draw, and from time to time the defendants paid in lump sums to the credit of those accounts, in accordance with current requirements, as shewn by the accounts sent in by F. of barley purchased, but these sums were not intended to, nor did they, represent any payments for any specific barley. F.'s business was to act as malting agent for the defendants exclusively. The defendants paid the duty as the same became payable upon the malt in F.'s premises. F. had fraudulently departed from the regular course of business. Instead of buying barley for cash and applying the balances at the provincial banks in payment for the same, he had been in the habit of sending in to the defendants fictitious accounts of barley purchased, misapplying the sums paid in for his own purposes, and providing the malt needed for the defendants' purposes by purchasing barley or ready-made malt on credit. He likewise from time to time sold barley which had been brought on to the maltings to raise money for his own purposes. The defendants believed, in consequence of the fictitious accounts and other false representations of F., that barley was from time to time purchased for cash, in accordance with the regular course of business, and on the faith thereof continued to pay sums of money into the banks for the purpose of paying for such barley, which they believed were so applied. F. subsequently absconded, leaving upon his premises barley to the value of about 22,000*l.*, and malt to the value of about 35,000*l.*, upon part of which duty had been paid by the defendants. The value of such malt and barley was less than the amount drawn from the banks and misappropriated by F. The defendants seized the barley and malt so left on F.'s premises, and, F. having been adjudicated bankrupt, the trustee in bankruptcy sued the defendants for the value of the same:—

Held, that the moneys advanced by the defendants to provide for the purchase of the barley were impressed with a trust; that even if the barley and malt left on the premises of F. were not bought in accordance with the authority given to him, and the legal property in the same was not vested in the defendants, but in

F., nevertheless F. was a trustee for the defendants, to the extent of the sums advanced by them, of such barley and malt, the same being either the product of trust moneys, or in substitution for the barley, in payment for which F. ought to have applied such trust moneys; that F. could not have set up his own breach of trust or have been heard to allege that the barley and malt was bought otherwise than according to the authority given to him; that the trustee in bankruptcy could not in this respect stand in a better position than F.; that the barley and malt were not in the order and disposition of F. as reputed owner thereof, it being notorious that "malting agents" are not usually the owners of the barley and malt on their maltings; and that consequently the plaintiff could not recover.

Affirmed by Ct. of Appl 9 QBD 265 CA

This was an action by the plaintiff, as trustee in bankruptcy of one Fairman, to recover the value of certain barley and malt alleged to have been converted by the defendants to their own use.

The facts fully appear from the judgments delivered.

March 3, 4, and June 25. *Sir Hardinge Giffard, Q.C.*, *W. G. Harrison, Q.C.*, and *Moulton*, for the plaintiff. (1) In order that the doctrine of equity with regard to following the proceeds of trust funds misappropriated may apply, there must have been an intrusting of specific funds for specific purposes. And there must be a possibility of identifying specific property as the proceeds of a specific fund so entrusted and misappropriated. There were not in this case specific advances in respect of the prices of specific barleys. Fairman was not a mere agent but an independent contractor whom the defendants financed. Equity might possibly have compelled specific performance of his contract by Fairman, and restrained him from appropriating the barley or malt to other purposes than those of the defendants, just as it probably might do in the case of any other contractor who has contracted to manufacture an article and received advances of capital to enable him to procure materials, but that is a very different thing from holding that any equitable property in, or lien upon, the particular goods passed to the defendants as against the trustee in bankruptcy. Take the case of a contract to supply iron rails, suppose the manufacturer to have stated that he will manufacture the rails out of particular iron on his premises, and to have obtained an advance on account of the price; equity might intervene to prevent the iron being otherwise appropriated, but, if bankruptcy supervened, equity would not compel specific performance by the trustee in bankruptcy, and the iron would form part of the general assets. The onus is on the defendants of shewing that any particular barley or malt represented the proceeds of a specific trust fund. Here it cannot be shewn that the barley and malt found on the bankrupt's premises specifically represent the proceeds of such a fund. All that appears is, that advances were made to the contractor generally to enable him to perform his contract to manufacture and supply malt, and certain raw material, viz. barley and certain malt are found on his premises. There is nothing to shew that the goods so found were ever appropriated to this particular contract, or can be considered to be the proceeds of the funds advanced. Even if the amount of malt on which duty was paid can be so considered, it cannot be identified or separated from the rest of the malt. Again, the bankrupt cannot be considered to have constituted himself trustee by estoppel through the representations made by him to the defendants. These amounted to no more than a representation that he would apply the moneys to be advanced to a certain purpose. In order to create a trust by representation of this sort there must be a false representation that certain existing property represents and is applicable to the purposes for which the funds were entrusted. There was no such representation here. Assuming that Fairman was trustee of the barley and malt for the defendants, then the beneficial owner is the "real owner" for this purpose within the meaning of the Bankruptcy Act, and these goods were in the order and disposition of Fairman as reputed owner with the consent of the defendants.

---

(1) The arguments on the question whether the legal property in the barley and malt, or any and what part of it, was vested in the defendants or Fairman at the time of the bankruptcy, and whether the verdict of the jury was against the evidence on this point, which were of considerable length, are not given, because they appear to a great extent from the judgments, and because, as will be seen, in the view the Court took, this point became ultimately immaterial.

Sir F. Herschell, S.G., *Benjamin, Q.C.*, and *Kenelm Digby*, for the defendants. The question between the trustee in bankruptcy and the defendants is precisely the same as it would be between the bankrupt and the defendants. If the goods pass in any way to the trustee they pass subject to the same equities as would have attached to them in Fairman's hands. The analogy of a person contracting to manufacture goods is altogether misleading. Fairman was malting agent for the defendants exclusively, and though as regards the sellers of the barley he was the principal, as regards his own employers he was bound to employ all the barley procured by him as their agent for their purposes. The sums advanced were advanced specifically for the purpose of being applied for the payment of the prices of the barley bought by the bankrupt as malting agent for the defendants exclusively. The bankrupt represented that he bought barley in accordance with the course of business, and that advances were necessary to pay for such barley, and the whole course of his conduct amounted to a continuous representation that the funds from time to time supplied had been, and would be, applied to the procuring of barley for the defendants' purposes. How could he be heard in equity to say that the barley and malt on his premises were not intended for the defendants, and so take advantage of his own breach of duty and abuse of trust? If he could not be heard to say so, neither can the plaintiff his trustee in bankruptcy. Assuming that persons having an equitable claim or charge on property, such as it is contended the defendants have, could be considered as "real owners" within the meaning of the reputed ownership section of the Bankruptcy Act, which is not admitted, the evidence here shewed that it was notorious that "malting agents" were not the owners of the barley and malt on their premises.

Sir H. Giffard, Q.C., in reply.

The cases cited during the argument will be found mentioned in the judgments.

Cur. adv. vult.

July 4. The following judgments were delivered:—

FIELD, J. This is an action brought by the plaintiff as trustee in bankruptcy of the estate of John D. Fairman (who became bankrupt on the 31st of December, 1878), to recover the value of large quantities of barley and malt seized by the defendants, and which the plaintiff alleges to have been, at the commence-

1881

HARRIS v. TRUMAN.

Field, J.

9 QBD 264

ment of the bankruptcy, part of the bankrupt's estate. The defendants deny that the goods were the property of the bankrupt at the time of his bankruptcy, and further claim them as their property. The case was tried before me and a special jury in the city of London. The plaintiff proved that the bankrupt was a licensed maltster carrying on business at Bishop's Stortford and other places, that his name as licensee was fixed upon the maltings, as required by 6 Geo. 4, c. 81, and that the barley and malt claimed were in his possession upon the premises at the time he became bankrupt. The plaintiff further proved that the bankrupt, having become hopelessly embarrassed, absconded on the 31st of December, 1878, and so committed an act of bankruptcy, and that the defendants entered into possession of his malting premises, and seized the malt and barley found there. From the evidence in answer to this case given by the defendants it appeared—that the great London and Burton brewers do not either make for themselves or buy ready-made all the malt which they require for the purposes of their business, but that they make arrangements with persons who occupy maltings and take out licenses as maltsters, and are known as "malting agents," who buy barley, malt it, and deliver the malt to the brewer as required, the latter paying the agent a commission upon the quantity steeped or malted, and which commission covers the buying and the malting, but not the cost of the barley. The capital required for this latter purpose is so large that the brewer invariably finds it, but the arrangements between the maltster and the various brewers differ materially in many respects. In the case of some brewers, the mode of transacting business was such as to render it reasonably clear that the "malting agent" passed the property in the barley bought by him to the brewers, immediately on their making the specific payments which they did for the specific quantities of barley bought by the agent and invoiced to them. In the present case that system was not pursued, and as there was never any specific agreement, either verbal or in writing, between the bankrupt and the defendants, it became necessary to resort to the course of business understood to be, and actually adopted between the parties, in order to ascertain whether the property in the barley or malt in question had ever, and if so when, passed to the defendants. This course of business was as follows:—The bankrupt hired or owned the necessary malting premises, he took out the necessary licenses, employed the necessary people and paid their wages, superintended the malting, went to market and bought the barley, and delivered the malt, when made, into the defendants' sacks, and for all this his remuneration was an agreed commission upon the quantity of barley bought and steeped. He also insured the barley and malt against loss by fire. At one time he had effected the insurance with and paid the premiums to any office he pleased, but in latter years the defendants, who stand to their own fire losses, required all their agents, and amongst others the bankrupt, to insure with them, they deducting the amount of the annual premiums from the amount due to him for his commission. The purchases of barley were very large, and, in order to provide the necessary funds for this purpose, the defendants opened accounts with three banks, at each of which they always kept a balance, and which balances always exceeded the aggregate amount of the supposed cost of the barley supposed to have been bought by the bankrupt. These accounts were opened in the names of and fed by the defendants; they were intended to be operated upon solely for the business of purchasing barley by them, and were drawn upon by the bankrupt. The malting season extends from the beginning of October to April, and at the end of each season balances amounting to 1500*l.* together were left at the defendants' bankers as a starting point for the next season's operations. Each week during the season the bankrupt was understood to attend the markets and buy barley, according to his own judgment and in his own name, he being admittedly, as between himself and the seller, the principal. The course of business in these markets is to buy by sample; the bulk is deliverable at variable periods, and if the bulk corresponds the payment is then due in cash.

It is important, however, to observe that the course of business which I am now detailing was that which the defendants understood it to be, but that as far as the bankrupt was concerned he had, in order to find money for his own purposes, for several years before his bankruptcy fraudulently departed from it in many most important respects without the defendants' knowledge.

Every week the bankrupt forwarded to the defendants a written statement of the parcels of barley he professed to have bought, and the names of the alleged sellers, and at the bottom were written the sums which the bankrupt requested the defendants to pay in to the credit of the defendants' provincial banking accounts, but these sums were not intended to represent, and did not represent, any payment for any specific barley, but were paid in in order to keep the accounts, upon which the bankrupt had the power of drawing, full. On every Monday the bankrupt left with the defendants half samples of barley, which were supposed to be those of the purchases contained in the preceding weekly memorandum, and the defendants examined the samples to see whether they suited their trade, and either approved or rejected them. The defendants always believed that the weekly sheets sent up by the bankrupt represented actual purchases of barley at prices actually given, and of which barley purchased they thought they saw the samples, and they believed that the bankrupt applied the moneys advanced by them to him in paying cash for these barleys at cash and not credit prices, and it was intended by the bankrupt that they should so understand and believe, his conduct in every respect amounting to a continuing course of representation to that effect, but after the bankrupt had absconded they ascertained for the first time that for several years this had not been so, but that the weekly statements as to names, quantities, and prices, or a very large proportion of them, were fictitious, and that instead of paying cash he had bought very large quantities on credit, the amount for barley thus bought remaining unpaid at the time of his bankruptcy being upwards of 40,000*l.*

At the end of every month the bankrupt forwarded to the defendants a statement of the parcels of barley bought, and the names of the sellers, and prices, and the defendants went through it with the bankrupt for the purpose of checking the quantities which were to be sent to Burton and those which were to be sent to London, and a copy of each of these statements was in due course entered in the defendants' "malt ledger" for the purpose of enabling them to make up the necessary final statement at the end of the season. This monthly statement was in like manner fictitious, but the defendants understood, and the bankrupt intended they should so understand, that it represented genuine cash purchases of barley of which they had approved, and which were to be malted by the bankrupt for them. The first important step in the process of converting barley into malt is the "steeping." It is at this point that the duty to the government becomes payable, and two of the defendants' firm had, as sureties, entered into the requisite bond for the purpose of securing the payment; at this stage also the revenue officer takes an account of and sends to the maltster his "charge," calculated upon the specific quantity of barley in actual process of being converted into malt, and this being forwarded to the defendants, they forwarded direct to the Inland Revenue the amount of the specific charge thus made for the specific malt. During the season the defendants visited the maltings whenever they pleased, and gave any directions they thought necessary, but the whole process of malting was carried on by the bankrupt's servants under his superintendence, and the malt was placed in defendants' sacks, and forwarded as they required, samples of the malt as dried off having been left by the bankrupt with the defendants for approval by them. At the end of the malting season a general statement was made up in the defendants' books, containing the different sums from time to time remitted by the defendants to their bankers, the cost of the quantities of barley which had been returned upon the monthly accounts as having been bought, and the amount of commission due to the bankrupt.

This course of business, as I have now stated it, was proved in the main by Arthur Pryor, one of the defendants.

On cross-examination it was elicited from him that he had also been examined as a witness in a prior action, brought against the defendants by some sellers of barley to Fairman upon credit, for the price of barley sold, and it appeared that on that trial he had stated in cross-examination that the bankrupt was not their agent for buying barley, but was their agent for making it into malt at 4*s.* 8*d.* per quarter, and he adhered to the statement on the present occasion. Pryor had also answered certain interrogatories, and as they were now put to him and he did not dissent from them, they became important evidence for the jury to act upon in drawing conclusions as to what were the real relations between the bankrupt and the defendants in reference to the barley assumed to have been bought by him. The important interrogatories and answers were those numbered 2, 3, 5, 6, 9, 10, 11, and the propositions asserted in them are, it seems to me, 1. That the bankrupt in buying barley did not buy "for" the defendants (No. 1), nor "for or on their account" (No. 5), nor "for the purpose of carrying on their business," and that "it was not received at the bankrupt's maltings and converted into malt for or on account of the defendants" (No. 6). 2. That the sums authorized to be drawn out by the bankrupt from time to time were not so authorized "in order that the bankrupt might be enabled to pay for the barley bought by him," but "in order that he might be supplied with money to enable him to carry on his business as a malting agent" (No. 9). With regard also to the weekly memorandums, Mr. Pryor stated in evidence on the present trial, that in making the remittances mentioned at the foot of them they, the defendants, were not guided by the amount of purchases alleged, but by the requirements at the bottom. It appeared from other witnesses that although all the barley which was actually malted on the bankrupt's premises was so malted with the intention of supplying it to the defendants as malt, it was not the case that all the barley bought by the bankrupt and brought on to the premises was so malted, because the bankrupt was in the habit, generally towards the end of each malting season, of selling barley, alleging as an excuse to his servants, falsely, that the defendants desired to reduce their stock, whereas in fact the defendants had no knowledge of any such practice, and the sales were made for the fraudulent purposes of raising money, and concealing his misappropriations. And it also appeared in evidence that the bankrupt had for some time past, instead of supplying the defendants with malt made by himself, bought ready-made duty-paid malt in the market and supplied it to the defendants; of this, however, the latter were also ignorant.

At the close of the defendants' evidence both parties claimed judgment upon the facts proved.

The Solicitor-General submitted that as a matter of law on the facts found the defendants were so entitled on the grounds:

1. That the property in the barley and malt was not vested in the bankrupt on the 31st of December, but that as to the barley the property was vested in the defendants, either (1*a*) on the original purchase by the bankrupt, or (1*b*) on the samples having been approved by the defendants, or (1*c*) on the payment of the money. 2. And as to the malt, that the conversion of the barley into malt did not alter the property, or that at all events the malt became the defendants' property as soon as it was made.

On the other hand Sir Hardinge Giffard submitted as a matter of law that the defendants had no case as to either malt or barley. 1. As to the barley, because the barley was bought in the bankrupt's name, and, as soon as the purchase was completed, vested in him. 2. That the defendants had a right to reject. 3. That the payment relied upon was not a specific payment for any barley, but a general remittance in round sums. 4. That the bankrupt was not the agent of the defendants to buy. 5. But that if he were, it is not shewn that any of the barley in his possession on the 31st of December was bought in accordance with any alleged authority, which was to buy for cash and not on credit, but that part, if not all of it, was bought on credit, and it is not yet paid for. As to the malt, Sir Hardinge Giffard submitted, 1, that the mere conversion into malt did not alter the property. 2. That there was no evidence where the malt in the bankrupt's possession on the 31st of December came from. 3. That there was no proof of any approval of the sample of the malt. And he lastly submitted, as to both barley and malt, that even if the defendants were the true owners, the barley and malt were in the possession, order, and disposition of the bankrupt as reputed owner with their consent. Upon this I called the attention of the Solicitor-General to the state of the evidence on this last point, and he then gave a considerable body of evidence tending to shew that the bankrupt was not the reputed owner of the goods, by reason that a malting agent was not reputed to be an owner of the stock on his premises, it being well known to all persons dealing in the market that he was merely an agent, and that the stock was the property of the brewer, for whom it was well known he was acting.

1881

HARRIS
v.
TRUMAN.

Field, J.

9 QBD 266

I held that the questions raised, as to the party in whom the property in the barley and malt was, as also that of order and disposition, were for the jury, of whom I asked specific questions, which with the answers of the jury were as follows:—

1st. Was it the intention of the bankrupt and the defendants, as evidenced by the agreed course of dealing between them, that the property in the barley bought by the bankrupt should become vested in the defendants, (*a*) at the time of the purchase by the bankrupt, or (*b*) on the approval of the sample, or (*ba*) correspondence of bulk with sample, or (*c*) on payment of the required amounts, or (*d*) at any and what later time before delivery to the defendants.

The jury answered all these questions in the negative.

2nd. As to the malt. Was it the intention that the malt should become the property of the defendants? (*a*) At its first coming into existence as malt, or (*b*) on payment of the duty, or (*c*) at any later stage before delivery? The jury answered on payment of duty.

3rd. Were the barley and malt seized by the defendants or any and what part thereof any portion of the barley or malt bought by the bankrupt referred to in your previous findings? The jury answered to this that there was no evidence.

4th. Were the goods on the 31st of December in the possession order, or disposition of the bankrupt with the consent and permission of the defendants, of which goods the bankrupt was the reputed owner? The jury answered to this that there was no evidence.

I asked the jury for an explanation of their last answer, and they added the following special finding: "We hold that as the goods in the possession of bankrupt on the 31st of December cannot be identified for lack of evidence, we cannot say whether they are or are not in the possession, order, or disposition of the bankrupt with the consent or permission of the defendants." Upon those findings I abstained from giving any judgment, leaving each party to move for what they might consider themselves entitled to, and thereupon the defendants obtained a rule to shew cause why the verdict should not be set aside and a new trial had on the grounds. 1st. That the verdict was against the weight of the evidence, and

1881

HARRIS
v.
TRUMAN.

Field, J.

9 QBD 266

on other grounds not afterwards pressed, but amongst others on the ground of misdirection, in not directing the jury that the defendants had a lien in equity upon the goods to their full value, or that the bankrupt was trustee of the goods for the defendants. The rule also asked that the judgment should be entered for the defendants. With regard to the alleged misdirection in not holding that the defendants were entitled to a lien, or that the bankrupt was a trustee for them, no such points were submitted to me by the Solicitor-General. The rule was argued before my Brothers Manisty, Bowen, and myself, during the last sitting.

In reference to that part of the rule which asks that the verdict may be set aside and a new trial had, if the ultimate result of the rule had rested upon the points raised at the trial and upon which the jury pronounced their verdict, I should have felt myself obliged to act on the verdict, for although the questions involved were nice and not free from difficulty, there was, I think, evidence upon which the jury might reasonably have found as they did. But however that may be, and whether the legal ownership of the barley and malt was vested in the bankrupt or not, the defendants' counsel very strongly contended that they were entitled to judgment on the ground (which was not raised at the trial) that from the course of business, as understood by both parties, a trust and confidence had been created between the defendants and the bankrupt, by which the latter was bound to appropriate the moneys advanced to him in the cash purchase of barley of which the defendants were to approve, and which barley and no other was afterwards to be converted into malt for their specific business, and on the last occasion when the case was before us the reasonable suggestion of the Court, that we should be at liberty to draw any inferences of fact not inconsistent with the verdict, having been with great propriety assented to, it is no longer necessary to regard the question between the parties as resting upon the grounds urged at the trial, but we are at liberty to give such judgment for either party upon any ground as upon the evidence not in contest either may be entitled to. Now it cannot, I think, be doubted that a trust to the effect contended for by the defendants' counsel was impressed upon the moneys advanced by the defendants to the bankrupt, and that the whole course of conduct on the part of the bankrupt amounted to an engagement with the defendants so to use the money, and not to apply it to any other purpose, and to a representation that he was faithfully performing the trust. It must be recollected that, by the very terms on which the business was conducted, the bankrupt was not at liberty to buy barley or use his maltings for any other purpose than that of keeping up a regular supply of malt fit for the defendants' business, and to be supplied to them from the barley of which they should have approved, and he was not acting as malting agent or otherwise for any other brewer.

It therefore seems to follow that when, in order to have barley on his premises to malt sufficient in quantity to represent that for the purchase of which he ought to have applied the money which he had fraudulently devoted to other purposes, he bought and brought on to the malting and proceeded to convert into malt barley otherwise bought, it is an irresistible presumption that he did so with the object and intention of malting that barley and supplying it as malt to the defendants, and of representing to them (as he in fact did at the end of every season, and in effect whenever upon their visits of inspection they saw barley on the premises) that the barley thus bought was bought for the benefit and purposes of the defendants in lieu of that which he ought to have applied their money to the payment of, and that he thus intentionally and irrevocably declared, as it seems to me, that he held that substituted barley upon the original trust with which the defendants' advances were impressed, and upon which he would have held barley bought with their money. That the defendants so understood it is clear, for it is impossible to suppose that they would have continued to make further advances to the bankrupt unless they had been led to believe, and did believe, that the money they had already advanced had been properly applied, that the monthly returns were true, and that the barley brought on to the malting from time to time was that for the purchase of which they had supplied the money.

At least these are the inferences of fact which I cannot help drawing, and if it be so it is not for my present purpose worth while inquiring whether or not there was evidence in the case that all or any and what portion of the barley or malt seized by the defendants on the bankrupt's premises had been actually bought with the money supplied by the defendants and in accordance with the trust. For it has long been an acknowledged principle that the Courts will, when the circumstances justify it, presume that property bought by a trustee empowered to lay out money in the purchase of similar property has been bought with the trust money, and that as between him and the cestui que trust it will be taken that he has bought the property for the purposes of his trust: and this is so not only when the question arises between the cestui que trust and trustee, but also when it arises between the former and any representative of the latter, whether by death or bankruptcy, and that the property is as much impressed with the trust in the hands of either executor or trustee, and does not form part of the general estate to be administered, but is the property of the defrauded cestui que trust. The trustee in bankruptcy or executor, who derives the property by bankruptcy or through death, can be in no better plight than the person he represents would have been, and holds it when it comes to his hands in trust for and applicable to the same purposes as the person he represents held it for: *Taylor* v. *Plumer*. (1)

I consider, therefore, that all the barley and malt which was seized by the defendants, even if, as found by the jury, the legal property in it was in the bankrupt, and whether the whole or any part of it had been bought by the bankrupt on credit or not, inasmuch as it was not in value sufficient to cover the advances made by the defendants, was held by the bankrupt upon the trust for the defendants which he in effect by his conduct had declared it to be held upon.

The product of or substitute for any property subject to a trust follows the nature of the original property, and the bankrupt could not have been heard, nor can his representative, the plaintiff, as trustee of his estate, to allege or permitted to avail himself of the bankrupt's own fraud and abuse of trust to defeat the title of his cestui que trust.

With regard to the question raised as to the barley having been in the order and disposition of the bankrupt, I am of opinion that the evidence on the part of the defendants clearly shews that the bankrupt was not the "reputed" owner, and that no title therefore passes to the plaintiff under the 5th sub-section of section 15 of the Bankruptcy Act of 1869.

---

(1) 3 M. & S. 562.

As my brothers concur in the result at which I have arrived, although they will express their own views, the consequence is that the defendants are entitled to judgment with costs.

MANISTY, J. The plaintiff is the trustee of the estate of one John Fairman a bankrupt, who for many years was malting agent for the defendants, the well known brewers, Truman, Hanbury, Buxton & Co. Fairman acted as malting agent for the defendants exclusively. He absconded on the 31st of December, 1878, and was adjudicated bankrupt on the 14th of January, 1879. The business of malting for the defendants was carried on by Fairman at Bishop's Stortford, and several other places. It is not necessary for me to describe the course of business between the defendants and the bankrupt, my Brother Field having fully done so. On the 31st of December, 1878, when Fairman absconded, there was in the maltings barley of the value of over 22,000*l.*, and malt of the value of over 35,000*l.* The defendants had paid the excise duty upon part of this malt. The part upon which the duty was paid was of the value of about 14,000*l.* During the four months ending 31st of December, 1878, the defendants had paid to Fairman (by placing it to his credit with the bankers) 121,000*l.*, which was more than sufficient to cover not only the price of all the barley which he led the defendants to believe that he had purchased for them during that time, including what was in the maltings when he absconded, but also his commission on all the malt which he led the defendants to believe that he made for them during that time, including the malt which was upon the premises when he absconded. Between the time when Fairman absconded, and by so doing committed an act of bankruptcy, viz., the 31st of December, 1878, and the time when he was adjudicated a bankrupt (14th of January, 1879), the defendants took possession of all the barley and malt which was in the maltings, and hence the present action by the plaintiff as trustee of Fairman's estate.

9 QBD 266

After the bankruptcy the defendants discovered that Fairman had been practising upon them a system of deceit and fraud for several years, by buying upon credit large quantities of barley other than that of which he had submitted samples, and at prices below those stated in his accounts, and also by buying considerable quantities of malt in lieu of malt which he professed to have made upon the premises. By these means the bankrupt defrauded the defendants of upwards of 100,000*l.*, without taking into account the 57,000*l.* worth of barley and malt which is the subject of the present dispute. He also at the time of his absconding owed a large sum, about 40,000*l.*, to farmers and dealers of whom he had bought barley and malt on credit. The defendants have paid all the farmers, protesting at the same time that they were not under any obligation to do so, but they have refused to pay, and have not paid the dealers.

The question in the cause is, whether the plaintiff, as trustee of Fairman's estate, is entitled to the barley and malt which was taken possession of by the defendants as already mentioned, or any part of it. The case came on for trial before Field, J., and a special jury at the Guildhall in London, in May, 1880, when the learned judge left several questions to the jury. My Brother Field has already stated what these questions and the answers to them were, and I need not repeat them. According to these findings, the property in the whole of the barley (value about 22,000*l.*), and in the part of the malt on which the excise duty had not been paid (value about 21,000*l.*), was in Fairman, while the property in the malt upon which duty had been paid (value about 14,000*l.*), was in the defendants. The learned judge reserved the case for further consideration.

In June, 1880, the defendants obtained a rule to shew cause: why the verdict should not be set aside, and a new trial had, on the grounds, 1. That the verdict was against the weight of the evidence; 2. That the learned judge misdirected the jury in not directing a verdict for the defendants, and in directing the jury that there was any evidence in support of the plaintiff's case, and that there was evidence that the property in the goods had not passed to the defendants, and that the burden of proving the identity of the goods was upon the defendants, and that the acts or admissions of the bankrupt were not evidence against or binding upon the trustee, and in not directing the jury that the defendants had a lien in law or in equity upon the goods for their full value, or that the bankrupt was trustee of the goods for the defendants: or why judgment should not be entered for the defendants. The plaintiff moved for judgment in his favour for the value of both the barley and the malt.

9 QBD 267

The defendants' rule and the plaintiff's motion came on together for argument. It was agreed that the Court should have power to draw inferences of fact, not inconsistent with the findings of the jury.

In my view of the case it is immaterial whether the property in the goods was vested in Fairman or the defendants, because, having regard to all the circumstances of this case, I am of opinion, and I find as a fact, that Fairman held both the barley and the malt as agent of, and in trust for, the defendants, consequently, subject to the question of reputed ownership to which I shall presently advert, neither the barley nor the malt would pass to the plaintiff. A trust or, in other words, a beneficial interest in personal property, unattended with possession or the legal ownership of it, need not be created by writing, seeing that chattels personal are not within the Statute of Frauds: *MacFadden* v. *Jenkyns.* (1) Such a trust may be either express or implied, an implied trust being founded upon an unexpressed but presumable intention of the parties, having regard to all the cirumstances of each case.

An implied trust and an express trust stand upon the same footing, and, subject to any questions of reputed ownership, are alike sufficient to prevent personal property passing to a trustee in bankruptcy: see sub-s. 1 of s. 15 of the Bankruptcy Act, 1869, and the following cases, *Godfrey* v. *Furzo* (2); *Taylor* v. *Plumer* (3); *Thompson* v. *Giles* (4); *Frith* v. *Cartland* (5); *In re Hallett's Estate.* (6)

I fail to see any difference between the case of an agent entrusted with goods for the purposes of sale, and an agent entrusted with goods for any other purpose, such as that of converting barley into malt for his principal: see per Jessel, M.R., *In re Hallett's Estate.* (1)

---

(1) 1 Ph. 153, 157.
(2) 3 P. Wms. 185.
(3) 3 M. & S. 562.
(4) 2 B. & C. 422.
(5) 2 H. & M. 417. 11 Jur N S 238
(6) 13 Ch. D. 696, 707.

It was contended on the part of the plaintiff that inasmuch as part of the barley in question was bought by the bankrupt on credit, and was not the identical barley of which samples had been shewn to the defendants, and inasmuch as the part so bought was mixed with and could not be distinguished from the other part which was bought according to instructions and paid for out of defendants' money, the whole belonged to Fairman, and passed to the plaintiff as the trustee of his estate.

It was also contended that the whole of the malt belonged to Fairman, and passed to the plaintiff, because part of it had been bought by the bankrupt, and was not made with barley purchased pursuant to the defendants' instructions, and because the part so bought was mixed with and undistinguishable from the remainder.

It seems to me that there are several answers to these contentions. One is that as against an innocent person no one can set up his own fraud or misconduct as a defence. Fairman by his conduct and representations induced the defendants to believe that the barley which was from time to time brought into the maltings was purchased for them, and the defendants, believing such to be the fact, made him payments from time to time which were more than sufficient to cover the price of the whole of it. He therefore could not have been heard to say that he did not hold the barley for them as their malting agent. See *Carr* v. *London and North Western Ry. Co.* (2)

Another answer is, that when the property in the possession of an agent who becomes a bankrupt is not the identical property entrusted or intended to be entrusted to him, but has been acquired by him in lieu of such property, the property so acquired does not pass to the trustee in bankruptcy: see *Taylor* v. *Plumer.* (3) That case is also an authority for the proposition that apart from statutory provision (such as that relating to reputed ownership) the trustee of a bankrupt is not in any better position than the bankrupt himself as regards the rights of third parties: per Lord Ellenborough, C.J., at p. 578, and see per James, L.J., in delivering the considered judgment of the Court of Appeal: *In re Mapleback.* (1) A third answer is, that, even if the trustee would have been entitled to the part of the barley and of the malt bought by the bankrupt in breach of his duty, provided it had been kept separate from the rest or could otherwise be identified (which I deny), he is not so entitled under the circumstances, it being well settled that if an agent or trustee mixes trust property with his own so that he is unable to distinguish which is his own, the whole will be treated as trust property, subject to any equitable claim which the agent or trustee may be able to establish: see *Spence* v. *Union Marine Insurance Co.* (2); *In re Hallett's Estate.* (3) In the present case it is clear that neither the bankrupt nor the plaintiff, as his representative, could establish an equitable claim to any part either of the barley or the malt.

---

(1) 13 Ch. D. 720.

(2) Law Rep. 10 C. P. 307, 316.

(3) 3 M. & S. 562, 567.

Another ground upon which the plaintiff claims to be entitled to the barley and the malt is that at the time of Fairman's bankruptcy the goods were in Fairman's possession, order, and disposition as reputed owner, with the consent of the defendants as true owners, within the meaning of sub-s. 5 of the 15th section of the Bankruptcy Act, 1869. Assuming the law to be as contended by the plaintiff's counsel, namely, that if the defendants had only an equitable title to the goods they were the true owners within the meaning of the statute, so that the question of Fairman's reputed ownership arises: see *In re Jackson* (4): still that question is one of fact: see *Ex parte Couston* (5): and having regard to all the circumstances of this case, and the evidence adduced on the part of the defendants, I have no hesitation in finding as a fact that the goods were not, nor was any part of them, in the possession, order, or disposition of Fairman as reputed owner with the consent of the defendants as true owners. All the large brewers have malting agents. Fairman was well known to be the malting agent for the defendants, and for no one else, and I cannot believe that a single person who had dealings with him supposed, or could reasonably have supposed for a moment, that he was the owner of either the 35,000*l.* worth of malt or the 22,000*l.* worth of barley which was in the maltings.

---

(1) 4 Ch. D. 150, 156.

(2) Law Rep. 3 C. P. 427, 437.

(3) 13 Ch. D. 719.

(4) Law Rep. 12 Eq. 354.

(5) Law Rep. 8 Ch. 520.

It only remains for me to notice the answers of one of the defendants (Mr. Pryor) to certain interrogatories, which were administered to him in an action which was brought by Messrs. Few & Thoday, who were corn merchants, against the present defendants. The action was brought to recover the price of a quantity of barley which Few & Thoday alleged Fairman had bought of them as agent for the defendants. The defendants denied that Fairman bought the barley on their credit, and, on the contrary, insisted that he had no authority to pledge their credit for it, the arrangement with him being that he was to buy barley in his own name and not as their agent, they keeping him in funds to enable him to pay for it in cash when it was brought into the maltings. The object of the interrogatories was to obtain admissions which would fix the defendants as undisclosed principals, and the answers were artfully framed to meet equally artful interrogatories. Some of the answers were far from being ingenuous, but I fail to see how in any view they can assist the present plaintiff. If they were true, then the property in the barley vested in Fairman in the first instance, and according to the finding of the jury it remained vested in him down to the time of his bankruptcy, but nevertheless, in my opinion, he held it on trust for the defendants. If, on the other hand, the answers were false, and the property was vested in the defendants, the verdict is wrong and ought to be set aside. It is conceded by the plaintiff that subject to the question of reputed ownership the defendants are entitled to judgment as regards the malt on which they had paid the excise duty, but for the reasons which I have given I am of opinion that the plaintiff's motion for judgment should be dismissed with costs, and that judgment should be entered for the defendants for the whole of the goods (both barley and malt) with costs.

BOWEN, J. The facts of this case have been stated so fully by my learned Brothers Field and Manisty, that it becomes

1881

HARRIS
v.
TRUMAN.

Bowen, J.

unnecessary for me to restate them. I also am of opinion that judgment should be entered for the defendants, and the reasons for my arriving at this view are substantially those stated by my Brother Field. It is perfectly true that there is no evidence to shew that any portion of the specific barley seized by the defendants, and in question in this action, was barley actually bought by the bankrupt with the defendants' money. But it was proved and was not disputed, that the bankrupt had no right as between himself and the defendants to have upon his premises barley which was not so bought. The barley actually there, if not purchased by means of the defendants' funds was fraudulently substituted by the bankrupt in the place of the barley that should have been so purchased, and I think that neither he nor his trustee in bankruptcy can stand in a better position towards the defendants in respect of the barley in fact on the premises, than if it was barley acquired by the honest expenditure of the moneys furnished to him. The only question accordingly which seems to me to be left is the question whether, if the barley in question had been (as it should have been) purchased by the bankrupt out of such moneys, the trustee could now claim it against the defendants.

I will assume for the purpose of this argument, and in accordance with the findings of the jury, that the legal ownership in the barley bought remained in the bankrupt till the payment of the duty on the malt. I entertain grave doubts whether this is the correct view of the transactions between them, but I will assume for the purposes of argument that it is so. I am nevertheless of opinion, even if the legal property in the barley purchased by the means of the moneys supplied by the defendants would not have vested in the defendants, and whether the bankrupt held such barley as trustee for them or not to the full extent of its value, that still they would at least have had a charge upon such purchased barley to the extent of the moneys they had advanced.

At the end of every month the bankrupt forwarded to the defendants a monthly statement which represented that the moneys which had been supplied to him had been in fact expended on the specific purchases therein detailed; and that the barley so purchased had in fact been delivered to and appropriated by him for the purposes of the malting. Every month the defendants went through this statement with the bankrupt with the object of distinguishing the quantities of barley to be forwarded respectively to Burton and to London, and copies of this monthly statement were regularly entered in the defendants' ledger for the purpose of the final settlement of accounts between them and him. It is impossible to doubt that it was on the faith of the accuracy of these representations contained in the monthly statements that the defendants both allowed the bankrupt to retain the moneys he had actually received and continued their advances to him. It appears to me that both parties meant that the specific barley purchased by the bankrupt and brought upon his premises should be appropriated to the purposes of the malting, and should not be parted with by the bankrupt to other persons, but should remain as a security to the defendants for those advances, even if, as the jury have found, it was not meant to become the absolute property of the defendants. If this be the true effect of the transactions, it seems to me that the bankrupt, by fraudulently substituting for the barley, which ought to have been so bought, other barleys which were procured by him in other ways, cannot get rid of the charge which it was the intention of the parties to create. This point was not made at the trial, and the jury therefore necessarily received no direction upon it. I should have felt great doubt and hesitation whether on this ground the case could escape being sent down for a new trial whatever the inconvenience and expense of such a course. But the parties have agreed that the Court should draw all inferences of fact which are not inconsistent with the findings of the jury, and I have no hesitation in drawing the inference that the intention of the parties was what I have said. Such a charge would, I think, not be destroyed in any way by the bankruptcy of the bankrupt, nor be affected by the reputed ownership clause of the Bankruptcy Act, on which part of the case I have nothing to add to what has been said already by my Brothers Field and Manisty.

Judgment for the defendants.

Solicitor for plaintiff: *W. P. Slater.*
Solicitors for defendants: *Clapham & Fitch.*

E. L.

1881
Feb. 22.

SPARROW *v.* HILL AND ANOTHER.

Practice—Costs, Taxation of—Plaintiff succeeding upon one of several Claims—Apportionment under special Order—Order VI. of Rules of Supreme Court (*Costs*), 1875, *rr.* 30, 32.

The plaintiff sued in respect of three heads of claim, as to two of which he failed, and as to the third recovered a small sum under the award of an arbitrator. By an order of the Court judgment was entered for the plaintiff for the sum so found due, "the plantiff to be allowed such costs as one of the masters may find that he has rightly incurred in recovering the above amount; and the defendants to be allowed such costs as they have rightly incurred in defending themselves on those points on which they have succeeded."

On the taxation the master allowed the plaintiff the general costs of the cause, disallowing only those items which applied exclusively to the parts of his claim on which he failed; and he allowed the defendants such costs only as were incurred by them by reason exclusively of the two items of claim which they successfully resisted:—

Held, that the taxation must be reviewed, for the master ought to have allowed to each party the costs applicable to the portion of the claim upon which he or they respectively had succeeded, and apportioned the general costs of the cause.

Rules 30 and 32 of Order VI. of the Rules of the Supreme Court (Costs), 1875, apply only where particular items are objected to, not where the general principle of the taxation is challenged.

Reversed on appeal 8 QBD 479 CA.

THE plaintiff was employed to do certain work at a house of the defendants at Nottingham. His original claim was,—first, 296*l.* 11*s.* 8*d.* the balance of his account for work done to the outside of the house; secondly, 592*l.* 7*s.* for work done to the inside of the house; thirdly, 216*l.* 15*s.* 3*d.* for gilding certain furniture and picture-frames; and fourthly, 64*l.* 8*s.* 11*d.* for picture-rods. At the trial the defendants relied upon an alleged agreement that the plaintiff was to be paid for the work a price to be fixed by one Williamson, an architect. On the part of the plaintiff it was denied that he had made any such agreement, and it was insisted that if he had it was limited to the first item of his claim, the external work only. The action was brought for the difference between Williamson's valuation and the plaintiff's charge. A verdict was directed for the plaintiff, subject to a reference. That verdict was afterwards set aside on the ground of misdirection, and a new trial ordered.

On the second trial the jury found that the agreement to be bound by Williamson's valuation applied to the first two heads of the plaintiff's claim, viz. to both the outside and the inside work. The first two items of the plaintiff's claim being thus disposed of, the remainder, viz. as to the gilding and the picture-rods, was referred to the arbitration of a barrister (in whose discretion were the costs of the reference), and he by his award found that the plaintiff was entitled, in respect of the matters referred to him, to 37*l.* 0*s.* 3*d.* beyond the sum paid; and judgment was given for the plaintiff accordingly, and the following order made with respect to the costs of the action,—"Pursuant to the order of the Court herein, dated the 27th of November, 1879, whereby, &c.,—it is adjudged that the plaintiff recover against the defendants the sum of 37*l.* 0*s.* 3*d.*, and such costs as one of the masters may find he has rightly incurred in recovering the above amount, to be taxed; and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on those points on which they have succeeded, to be also taxed."

The master, on taxation, allowed the plaintiff the general costs of the cause (including the costs of the first trial), disallowing only those items in his bill which applied exclusively to the parts of the claim upon which he had failed to succeed; and he allowed the defendants only certain of the costs which he had taxed off the plaintiff's bill.

On the part of the defendants, the taxation was objected to upon the following grounds:—

"1. That the plaintiff was not entitled to any costs for the first trial, the defendants having obtained a rule for a new trial.

"2. That the plaintiff is not entitled to any costs under the rule for a new trial, as no provision was made for them by that rule.

"3. That the defendants are entitled to certain costs allowed by the order dated the 27th of November, 1879, and which the defendants contend should be taxed and allowed on the principles of the case of *Knight* v. *Purssell.* (1)

"4. That it is the intention of the defendants to move the Court on the question of what costs the defendants have rightly

(1) 49 L. J. (Ch.) 120. WN (1879) 152.

incurred in defending themselves on the points on which they have succeeded in this action.

"5. That the defendants object generally to the taxation of the plaintiff's bill until the above question has been decided."

To these objections the master answered,—"There was but one issue, on which the plaintiff recovered the sum of 37*l.* 0*s.* 3*d.* beyond 675*l.* paid after action brought, out of three items which he claimed. He is entitled to all the general costs of the cause, excluding only such items of costs (if any) or parts of items of costs as are applicable exclusively to the two items on which he failed, or would not have been incurred if those two items had not been in question. The defendants, on the other hand, are entitled to such costs only as were incurred by reason exclusively of the two items of claim which they successfully resisted, or, in other words, such costs only as would not have been incurred if those items had not been in question. The plaintiff is clearly entitled to the costs of both trials, to be ascertained on the above principle."

Graham, for the defendants, moved for a review of the taxation. The obvious intention of the order of November, 1879 was, that each party should have his costs so far as he had succeeded in the claim or defence. The master, instead of taxing the bill of each party, as directed, has altogether ignored the order, and has proceeded to tax the plaintiff's bill in the ordinary way. Under this order, the plaintiff clearly was not entitled to the costs of the first trial, or to those of the rule for setting it aside. The master should have adopted the course pursued in *Knight* v. *Purssell* (1), and allowed the defendants all the general costs applicable to the items of claim upon which they succeeded.

Buszard, Q.C., and *Dugdale*, contrà. The requirements of rules 30 and 32 of the Additional Rules of August, 1875, have not been complied with. (2) The particular items objected to are not specifically stated in the "objections."

---

(1) 49 L. J. (Ch.) 120. WN 09/102

(2) Rule 30 provides that "any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may at any time before the certificate or allocatur is signed, deliver

[*Graham.* The objection is not addressed to particular items of charge: it is that the master has proceeded to tax upon an erroneous principle.]

There was but one cause of action, and one single issue, viz. whether there was an agreement between the parties that the amount of the plaintiff's charges should be subject to the certificate of the architect. As to part of the work done, the jury found that the defendants' contention was right, and some items of the plaintiff's claim were struck off: as to other part the jury decided against the defendants. The master has properly exercised his discretion. As to the costs of the first trial, the plaintiff was clearly entitled to them: *Field* v. *Great Northern Ry. Co.* (1), *Knight* v. *Purssell* (2), has no resemblance to this case.

GROVE, J. It appears to me that the master, in taxing these costs, has proceeded upon an erroneous principle. The order upon which the taxation took place was as follows:—"That the plaintiff recover against the defendants the sum of 37*l.* 0*s.* 3*d.*, and such costs as one of the masters may find he has rightly incurred in recovering the above amount, to be taxed; and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on those points on which they have succeeded, to be also taxed." It appears to me that that order must have some meaning other than the ordinary result; the more so as it does not speak of separate issues, but calls them points, which means I presume the portions of the plaintiff's claim upon which the defendants have succeeded.

---

to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items or parts or part thereof objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same."

Rule 32 provides that "any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as to the judge may seem just: but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid."

(1) 3 Ex. D. 261.

(2) 49 L. J. (Ch.) 120. WN(1879)108.

The action was brought substantially for three separate heads of claim,—1. For the balance of the plaintiff's charge for work done to the outside of the defendants' house at Nottingham,—2. For work done to the inside of the house,—3. For gilding certain furniture and for the price of certain picture-rods supplied to the defendants. The case was tried before Lord Justice Bramwell, and the plaintiff was successful. A new trial, however, was granted, on the ground of misdirection. The case went down to trial again, when the jury found for the defendants in respect of the first two heads of claim, holding that the plaintiff was bound as to these by the valuation of the architect, and that enough had been paid into Court. The remainder of the plaintiff's claim (which the jury found was not within the special agreement) was referred to Mr. Turner, who by his award found that the plaintiff was entitled to recover 37*l.* 0*s.* 3*d.* beyond the money paid. Thus by far the largest portion of the plaintiff's claim was decided in the defendants' favour. In these circumstances the order in question was made. But for that order the master's taxation would have been correct. He has allowed the plaintiff the general costs of the cause, including the costs of the first trial, disallowing only those items in his bill which applied exclusively to the parts of the claim in respect of which he had failed; and he has taxed off from the defendants' bill all the items of the general defence, thus disallowing the bulk of the bill. In this I think he has failed to act within the intention and meaning of the order, which was that the costs of each party were to be allowed or disallowed according as each had rightly incurred them in sustaining or resisting the respective claims; and that where particular items were applicable to all the points of claim or defence, they were to be apportioned. It was not intended that the general costs of the cause should be allowed to the plaintiff because he ultimately recovered something. The order was specially framed to avoid that result.

The master has himself given us the principle upon which his taxation proceeded. He says: "There was but one issue, on which the plaintiff recovered the sum of 37*l.* 0*s.* 3*d.*, beyond 675*l.* paid after action brought, out of three items which he claimed. He is entitled to all the general costs of the cause, excluding only such items of costs (if any) or parts of items of costs as are applicable *exclusively* to the two items on which he failed, or would not have been incurred if those two items had not been in question. The defendants, on the other hand, are entitled to such costs only as were incurred by reason *exclusively* of the two items of claim which they successfully resisted, or, in other words, such costs only as would not have been incurred if those items had not been in question. The plaintiff is clearly entitled to the costs of both trials, to be ascertained on the above principle."

The master has not apprehended the principle upon which the order was framed. The order evidently meant something ultra the ordinary course of taxation; it intended that each party should recover his costs so far as each item applied exclusively to matters upon which he had succeeded, and that the general costs applicable to all the matters should be apportioned. Rules 30 and 32 of Order VI. of the Rules of the Supreme Court (costs), 1875, apply only where specific objections are made to particular items. Here, the objection was not to specific items as such, but to the principle upon which the whole bill was taxed. *Knight* v. *Purssell* (1), is a strong authority in favour of the view the Court is taking. There the plaintiff, who claimed an injunction in respect of three distinct matters, only obtained it in respect of one; on the taxation of costs the master allowed the plaintiff one-third of the costs of the whole action, and the defendants two-thirds. I do not say, nor do I understand Vice-Chancellor Bacon to say, that that is necessarily the proper mode of partition: but, in default of a better, it may be right. However that may be, I think the principle upon which the master proceeded was clearly an erroneous one. Such portion of the defendants' costs should be allowed to them as were rightly incurred by them in defending themselves on the points on which they succeeded, not the general costs of the cause, but a proper apportionment on the principle I have stated.

LINDLEY, J. I am of the same opinion. The first objection urged on the part of the plaintiff was, that rules 32 and 34 had not been complied with, the defendants merely stating generally that they objected to the principle of the taxation. Those rules, however, apply only where particular items are objected to and discussed, to draw the attention of the master or the Court to specific points. Here, the question did not turn upon the allowance or disallowance of particular items, but upon whether or not the master in taxing these bills has proceeded upon a correct principle. That leads us to the merits of the case, the construction of the order. I do not see much to object to in the plaintiff's costs. The master seems to have taxed the plaintiff's and the defendants' bills upon different principles. The order, however, uses the same words as regards both bills. The plaintiff is to have such costs as the master may find that he has rightly incurred in recovering the 37*l.* 0*s.* 3*d.*; and the defendants are to have such costs as they have rightly incurred in defending themselves on the points on which they have succeeded. Both bills should have been taxed from beginning to end upon the same principle. The master, in taxing the defendants' bill, has allowed only those items which were applicable solely and exclusively to that portion of the claim upon which the defendants were successful. The bills must be referred back to be re-taxed according to the rule adopted in *Knight* v. *Purssell* (1), not as to the proportions, but according to the general principle there laid down; the costs of the summons and of this motion to be allowed to the defendants.

---

(1) 49 L. J. (Ch.) 120. WN (1879) 182.

Dugdale. Costs are seldom, if ever, allowed where there has been a mistake of the master.

LINDLEY, J. That rule is no longer applicable since the Judicature Act, 1873.

Order accordingly.

Solicitors for plaintiff: *Walker, Son, & Field, for Smith & Howe, Wednesbury.*

Solicitors for defendants: *Taylor, Hoare, & Taylor, for Maples & M'Craith, Nottingham.*

J. S.

(1) 49 L. J. (Ch.) 120. WN (1879) 152

HARMON, PETITIONER; PARK, RESPONDENT.

1881
June 15.

Municipal Corporation—Election of Town Councillor—Nomination Paper—Substitution of different Proposer without privity of assenting Burgesses—Municipal Elections Act, 1875 (38 *&* 39 *Vict. c.* 40), *s.* 1, *subs.* 2.

By the Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), s. 1, subs. 2, at any municipal election (of councillors) every candidate shall be nominated in writing; the writing shall be subscribed by two enrolled burgesses of such borough or ward as proposer and seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination.

At an election of a ward councillor a burgess was nominated in a paper signed by B. and H. as proposer and seconder, and by eight other burgesses as assenting to the nomination. After the nomination paper had been delivered to the town clerk it was altered in the absence of the seconder and assenting burgesses by striking out the name of B. as proposer and substituting that of G., another duly enrolled burgess:—

Held, that the nomination was invalid.

SPECIAL CASE.

The borough of Sunderland, Durham, is divided into wards, one of which is called the West Ward. The West Ward is represented in the council of the borough by six councillors. Owing to the death of one of the councillors representing the ward, an extraordinary vacancy occurred in the representation in or about October, 1880.

Mark Harmon, the petitioner, at the time of the signing of the nomination paper hereinafter mentioned, and at the time of the election, was a person enrolled on the burgess roll of the borough and was entitled to be so enrolled, and was qualified to be elected to the office of town councillor for the ward.

The name and qualification of the petitioner appeared on the burgess roll as follows:—

No. 1 Polling District, West Ward, Division 1.

No.	Name of Voters in Full, Surname being first.	Place of Abode.	Nature of Qualification.	Name and Situation of Qualifying Property.
110	Harmond, Mark	5, Hylton Road, West	House	5 Hylton Road, West

The petitioner was at the time of the nomination a person well known in the borough, and his description on the burgess roll, although inaccurate in that his name appeared on the roll as "Harmond" instead of "Harmon," was such as commonly to be understood as applying to the petitioner. No person of the name of "Harmond" then lived or now lives at No. 5, Hylton Road West, and there was no person in the borough answering to the said description on the burgess roll other than the petitioner.

The petitioner and Robert Park, the respondent, were the only persons nominated as candidates at the election for the ward.

The following is a copy of the nomination paper of the petitioner.

"Nomination Paper.

"Borough of Sunderland.

"Election of one councillor for West Ward in the said borough, to be held on the 15th day of October, 1880.

"We, the undersigned, being respectively enrolled burgesses for West Ward in the said borough, hereby nominate the following person as a candidate at the said election:—

Surname.	Other names.	Abode.	Description.
Harmon	Mark	Hylton Road, West	Licensed Victualler

(Signed) "1. John Green of *4, Lime Street, 1595.
"2. William Anthony Hope of *197 9, Holly Terrace.

"We, the undersigned, being respectively enrolled burgesses for the said ward, do hereby assent to the nomination of the above person as a candidate at the said election.

"Dated this 6th day of October, 1880.

(Signed)
"1. Thomas Doxford of *2514 13, Water Street.
"2. George Dobling of *2480 10, Siksworth Row.
"3. John Sedgwick of *106 44, Franklin Street.
"4. Abel Mills of *2838 3, Hodgson's Buildings.
"5. Charles Lusk Bailey of *198 2, Alexander Terrace.
"6. William Cordell of *204 11, Alexander Terrace.
"7. Paul Stabler of *184 2, Holly Terrace.
"8. William Graham Appleby of *248 13, Gilsland Street, South.

"* The number on the burgess roll of the burgess subscribing with the situation of the property in respect of which he is enrolled on the burgess roll.

"N.B.—Only one person must be nominated by this paper. Delivered by the proposer, Mr. John Green, the 6th day of October, 1880, at 4.40 P.M.

"THOMAS MAXFIELD."

The nomination paper was brought to the town clerk's office by a person of the name of Graham, who was not the proposer or seconder of the petitioner or one of the assenting burgesses, and who asked the clerk in attendance to see if it was in order. Such nomination paper when so brought to the town clerk's office had on it the name of "William Ball," as the proposer, but without any number on the burgess roll or situation of qualifying property. It had also on it the name of a seconder, and was also subscribed by eight assenting burgesses. The clerk on looking at the burgess roll found the name of "William Ball" on the list, but it was noted in the margin "not entitled to vote here," and the name of William Ball was not on any other part of the burgess roll. John Green, a duly enrolled burgess of the West Ward, happened to come into the town clerk's office at the time, and on seeing the nomination paper in Graham's hands signed by Ball, and knowing that the name of William Ball was not on the burgess roll as a person entitled to vote, struck out Ball's signature and inserted his own name in lieu thereof, adding his own number on the burgess roll and the situation of the property in respect of which he was enrolled a burgess, Ball and the seconder and assenting burgesses not being present, and thereupon Green handed in the nomination paper to the town clerk.

The nomination paper subscribed as aforesaid, was delivered by Green to the town clerk of the borough on the 6th of October, 1880, before 5 o'clock in the afternoon, the said 6th of October, being at least seven days before the day of election, and the town clerk sent notice of such nomination to the petitioner and caused the names of the petitioner, with his place of abode and description, as a person duly nominated, to be printed and placed on the notice board at the outer door of the town clerk's office where such notices are usually displayed, and also on or near the door of the corporation buildings, and in other conspicuous parts of the borough and ward.

On the 7th of October, 1880, the respondent objected in writing to the nomination of the petitioner, on the grounds:—

First. That the name of Mr. Mark Harmon, the candidate proposed, did not appear on the burgess list in force for the election.

Secondly. That the nomination paper of the said Mark Harmon is bad on the ground that the signatures of the seconder and assenting parties were placed thereto, whilst the name of William Ball (a person not on the register) appeared therein as proposer.

Thirdly. That such nomination was bad on the ground that the signature of William Ball was struck out without his consent being first obtained, and the signature of John Green inserted in its place.

William Ball was a person not on the burgess roll for the borough as a person entitled to vote, and he was not on the burgess roll for the ward, and was a person not entitled to vote at the election.

The mayor of the borough, on the 7th of October, 1880, attended, pursuant to notice, to decide upon the objections, and after due consideration decided that the nomination of the petitioner was bad by reason of its non-compliance with s. 1 (sub-s. 2) of the Municipal Elections Act, 1875, and the respondent was subsequently declared duly elected, as being the only person duly nominated.

The question for the opinion of the Court is whether under the circumstances the mayor was right in deciding that the nomination of the petitioner was bad.

G. Bruce (*J. Robins*, with him), for the petitioner, argued first that the misnomer of the petitioner in the burgess roll was immaterial, the roll having been made out by a public officer and not by the parties. [No judgment having been given on this point, it is unneccessary to refer to it further.]

Secondly, the assent of the eight burgesses to the nomination paper was in no way affected by afterwards putting another

1881

HARMON
v.
PARK.

proposer in place of the previous one. They merely signified their assent to the candidature of the petitioner, and this assent was not dependent upon his being proposed or seconded by any particular person.

Ridley, for the respondent, was not heard.

GROVE, J. I am clearly of opinion that the second point must be decided in favour of the respondent, and this makes it unnecessary to express any opinion as to the first point—the misnomer of the appellant in the burgess roll. The Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), s. 1, sub-s. 2, enacts that at every election of a councillor, every candidate shall be nominated in writing, and the writing shall be subscribed by two enrolled burgesses as proposer and seconder, and by eight others as assenting to the nomination. Each candidate is to be nominated by a separate nomination paper, but the same burgesses may subscribe as many nomination papers as there are vacancies to be filled. I can find no ambiguity in these words. Then turning to the Schedule, Form No. 2, the words of the nomination papers are "We the undersigned, hereby nominate the following person as a candidate at the election," and the words are followed by the signature of proposer and seconder and by the eight burgesses assenting to the nomination. So that the substance of the papers consists of two persons naming the candidate and in eight others assenting to this nomination.

The argument for the appellant was that these eight persons assent to the nomination of the candidate as a proper person to be nominated; an argument which if carried to its full extent must involve the proposition that the assenting burgesses may subscribe a nomination paper with the names of proposer and seconder in blank. But the assents required by the Act are to the nomination in the form in which it is written, so that any person assenting may first see who is proposer and seconder. It may well induce them to give their assent if they find that the proposer and seconder are good and responsible persons in whom they may trust. I think, therefore, that the nomination was bad, and the name of the appellant properly rejected as a candidate.

Lindley, J. I am of the same opinion. The Act of Parliament requires that the eight burgesses shall assent to the nomination. What then is the nomination in writing to which they assent? The nomination consists in filling up the name of the candidate on the nomination form, with the signatures of the proposer and seconder. The argument for the petitioner comes to this, that the eight persons might sign even before the name of the candidate was on the nomination paper. This is not the kind of assent required by the statute. The nomination must precede the assent, the assent must not precede the nomination.

Lopes, J., concurred.

Solicitors for petitioner: *Bell, Brodrick, & Gray, for Snowball, Sunderland.*

Solicitors for respondent: *Brownlow & Howe, for Ritson, Sunderland.*

A. P. S.

March 28.

[IN THE COURT OF APPEAL.]

THE NEW ZEALAND AND AUSTRALIAN LAND COMPANY *v.* WATSON AND ANOTHER.

Principal and Agent—Undisclosed Principal—Consignor and Consignee—Sub-contract—Privity of Contract—Right to follow Goods or Proceeds—Trustee.

8 QBD 263
9 QBD 536
539, 542
544
8 App Cas
815-6
24 CLD 59
60-7-8-9
70-1, 81

The plaintiffs, who were landowners in New Zealand, were in the habit of shipping wheat from New Zealand to England for sale on the London market, taking bills of lading which made the wheat deliverable to themselves in London, and indorsing these bills to M. and T., merchants and factors at Glasgow, with instructions to sell the wheat in London. M. and T. having no house or agency in London were themselves in the habit of indorsing these bills of lading to the defendants, who were cornfactors and brokers in London, for the purpose of their selling there the wheat. When any sales were effected, M. & T. delivered account sales to the plaintiffs in the usual form, deducting a del credere commission of 3*l.* per cent., whilst the terms upon which the defendants were employed by M. & T. were different, being a factorage of 2*l.* per cent. and not a del credere commission. The indorsement of the bills of lading by the plaintiffs to M. & T. and by M. & T. to the defendants, was in each case only for the purpose of selling the wheat and without the intention of passing any property in it. The plaintiffs knew that the sales effected for them by M. & T. in London were made by brokers employed by M. & T., but the plaintiffs were in no way parties to the particular contracts of sale nor were their names disclosed upon them. The defendants effected sales of certain cargoes of wheat which had been so consigned for sale by the plaintiffs in the above mode, and paid the proceeds into their own account with their bankers, and from time to time made remittances to M. & T. on account of them; but upon reference to the defendants' books of account the proceeds of the particular cargoes could be separated and identified.

M. & T. carried on a business at Leith as well as at Glasgow, and they employed the defendants in respect of both, and when they stopped payment which they did, they were indebted to the defendants upon the Leith account but not on the Glasgow account.

The plaintiffs having brought an action against the defendants for the net balance of the proceeds of the said cargoes of wheat after deducting the remittances made to M. & T. in respect thereof, but without giving credit due to them from M. & T. on other transactions, the jury found at the trial first, that the plaintiffs did not, through their agents, employ the defendants to sell and account for the proceeds of the wheat; secondly, that the defendants knew, or had reason to believe, that M. & T. were acting in the sales as agents for a third person:—

Held, reversing the judgment of Field, J., that the plaintiffs were not entitled to recover, as there was no privity of contract between them and the defendants, and the defendants did not stand in any fiduciary character towards the plaintiffs so as to entitle the latter to follow the proceeds of their property in the defendants' hands, and as whatever right the plaintiffs might have had as owners to claim the wheat before it had been sold, they had no right, after such sale, to the proceeds, without giving credit for the sum due to the defendants from M. & T., on their general account.

Appeal by the defendants from the judgment of Field, J., on further consideration. (1)

The action was to recover 2571*l.* 8*s.* 6*d.*, the balance in the defendants' hands of the proceeds of three cargoes of wheat, ex the vessels *Oamaru*, *James Wishart*, and *Auckland*, consigned to them for sale by Messrs. Matthews & Thielman (who were merchants and factors at Glasgow), after giving the defendants credit for such sums as they had remitted to Matthews & Thielman on account of such proceeds. It appeared that the plaintiffs who were landowners in New Zealand and had offices in Glasgow, but no office or agency in London, were in the habit of shipping wheat, the produce of their land, to England, for sale in the London market, and of taking bills of lading in which the wheat was made deliverable to themselves in London. These bills were indorsed to Matthews & Thielman, at Glasgow, with instructions, as the agents of the plaintiffs, to sell the goods in London. Matthews & Thielman had no house or agency in London, and their mode of realizing the produce on behalf of the plaintiffs was by indorsing the bills of lading to the defendants who were corn factors and brokers in London, for the purpose of the sale of the wheat by them. The indorsement of the bills of lading by the plaintiffs to Matthews & Thielman, and by Matthews & Thielman to the defendants, was in each case only for the purpose of selling the wheat and without the intention of passing any property in it. Matthews & Thielman, when any sales had been effected, delivered account sales to the plaintiffs in the usual form, deducting a del credere commission of 3 per cent. whilst the terms of employment between Matthews and Thielman and the defendants were different, being a factorage of 2 per cent. and not a del credere commission. The plaintiffs knew that the sales effected for them by Matthews & Thielman in London were made by brokers employed by Matthews & Thielman, but the plaintiffs were in no way parties to these sub-contracts, nor were the plaintiffs' names disclosed upon them, Matthews & Thielman appearing upon the face of them not as agents for any one but as principals.

---

(1) 5 Q. B. D. 474, nom. *New Zealand and Australian Land Company* v. *Ruston and Another*.

The defendants, in pursuance of their employment, effected sales of the cargoes in question and paid the proceeds into their own account with their bankers in the ordinary way, and from time to time made remittances to Matthews & Thielman on account of them. The defendants' books shewed the amounts received and paid in respect of each particular cargo, so that the proceeds of these sales could be separated from the other credits, and traced and identified. Matthews & Thielman carried on a business at Leith as well as at Glasgow, and they employed the defendants both in respect of their Glasgow business and their Leith business, and when Matthews & Thielman failed and stopped payment, as they afterwards did, they were indebted to the defendants upon the Leith account, but not on their Glasgow account.

The balance which the plaintiffs claimed was, after giving credit to the defendants for all sums remitted to Matthews & Thielman, in respect of the sales of the three cargoes in question, but without giving credit for amounts due to the defendants from Matthews & Thielman on other transactions, but which the defendants sought to set off against the plaintiffs' claim.

In the statement of claim, the plaintiffs alleged that they, through their agents, retained and employed the defendants to sell and dispose of the cargoes of wheat ex the three vessels, *Oamaru, James Wishart,* and *Auckland,* for the plaintiffs for reward to the defendants in that behalf, and to account to the plaintiffs for the proceeds thereof, that the defendants accepted the said employment and received and sold the goods for the purpose and on the terms aforesaid, but had refused to pay the proceeds of such sale to the plaintiffs.

The defendants in their statement of defence, denied that they were so retained or employed by the plaintiffs, and alleged that they were employed by Matthews & Thielman who acted as principals, and to whom they had accounted.

At the trial the learned judge left two questions to the jury, first, did the plaintiffs through their agents employ the defendants to sell and account for the proceeds to the plaintiffs, and did the defendants accept that employment and sell for the plaintiffs? Secondly, did the defendants know or have reason to believe that Matthews & Thielman were acting in their sales as agents for another?

The jury answered in the negative the first, and in the affirmative the second of these questions.

The learned judge afterwards gave judgment for the plaintiffs for the amount they claimed.

The defendants appealed.

C. Russell, Q.C., and *Finlay,* for the defendants. In giving judgment for the plaintiffs, Field J., relied upon *Knatchbull* v. *Hallett* (1), but this case is not in point: the learned judge ought to have taken into account that the plaintiffs put Matthews & Thielman into the place of principals, and the state of facts found by the jury cannot be disregarded. The question depends upon the law of principal and agent; and the decisions, as to the liability of the London agents of country solicitors to the client, shew that no privity existed between the plaintiffs and the defendants, and that the present action is not maintainable: *Robbins* v. *Fennell* (2); *Stephens* v. *Badcock* (3); *Cobb* v. *Becke.* (4)

(1) 13 Ch. D. 696.
(2) 11 Q. B. 248.
(3) 3 B. & Ad. 354.
(4) 6 Q. B. 930.

The defendants were not employed by the plaintiffs and are not accountable to them: *Schmaling* v. *Thomlinson* (1); *Cull* v. *Backhouse.* (2) It is laid down in *Myler* v. *Fitzpatrick* (3), that a mere agent is to account to his principal only. *Toland* v. *Murray* (4) is a decision of an American Court; it does not conflict with the argument for the defendants. The decisions as to the liability of bankers, who are entrusted with the collection of money, establish that no right to sue exists without privity of contract: *Mackersy* v. *Ramsays* (5); *Prince* v. *Oriental Bank Corporation.* (6) The defendants are entitled to avail themselves of their set-off: *Armstrong* v. *Stokes.* (7)

H. Matthews, Q.C., and *Barnes,* for the plaintiffs. In this action the plaintiffs merely seek to recover funds, the produce of their property, which have actually reached the defendants' hands. The employment of the defendants by Matthews & Thielman to sell on the London market was authorized by the plaintiffs, as it was necessary that there should be some one in London to represent the plaintiffs, and get delivery there of the wheat. Then, the defendants employment as sub-agents being authorized by the plaintiffs, any contract of sale made by the defendants would be as binding on the plaintiffs as if made by the plaintiffs themselves, and there would consequently be a privity of contract between the plaintiffs and defendants: Story on Agency, ch. vii. s. 201: *Moon* v. *Guardians of Witney Union* (8); 2 Duer on Insurance, p. 355; *De Bussche* v. *Alt.* (9) The defendants were not only sub-agents lawfully authorized to act as such, but they knew that Matthews & Thielman were acting only as agents for a third person; therefore the plaintiffs had a right to intervene and sue for the proceeds, without any right of the defendants to set off what might be due to them from Matthews & Thielman on their general account: *Rabone* v. *Williams* (10); *Sims* v. *Bond* (11); *Mann* v. *Forester* (12); *Maans* v. *Henderson* (13); *Lanyon* v.

---

(1) 6 Taunt. 147.

(2) 6 Taunt, 148, n.

(3) 6 Mad. 360.

(4) 18 Johnson (New York, U.S.) 24.

(5) 9 Cl. & F. 818.

(6) 3 App. Cas. 325.

(7) Law Rep. 7 Q. B. 598.

(8) 3 Bing. (N.C.) 814.

(9) 8 Ch. D. 286.

(10) 7 T. R. 360, n.

(11) 5 B. & Ad. 389.

(12) 4 Camp. 60.

(13) 1 East, 335.

Blanchard (1); *Westwood* v. *Bell.* (2) If the defendants are not liable as the plaintiffs' agents they are liable for the conversion of the wheat upon the principle of the decision in *Hollins* v. *Fowler.* (3) Moreover the defendants, as agents for sale, stood in a fiduciary position towards the plaintiffs, who as beneficial owners had a right therefore to follow the proceeds if they could be identified, as they clearly could be in the present case: *Knatchbull* v. *Hallett* (4); *Ex parte Kingston, In re Gross* (5); and *Ex parte Cooke, In re Strachan* (6); and in the notes to *Ryall* v. *Rowles* (7) it is shewn that one who has money to be paid to another person is bound after notice of this to pay it to such person, although there may be no contract between them to do so. At common law, apart from any equitable doctrine, the beneficial owner of goods can follow them and take them out of the hands of any one who may have obtained possession of them. Then, if such owner can follow the goods he ought also to be able to follow their proceeds if he can identify them.

Finlay, in reply.

Cur. adv. vult.

BRAMWELL, L.J. With the sincere respect I always have for the opinion of my Brother Field, I confess that I cannot come to the same conclusion as he has in this case. The statement of claim was that the plaintiffs, through their agents, retained and employed the defendants to sell and dispose of certain quantities of grain by the vessels *Oamaru*, *James Wishart*, and *Auckland*, for the plaintiffs for reward to the defendants in that behalf, and to account to the plaintiffs for the proceeds thereof; and that the defendants accepted the said employment, and received and sold the goods for the purpose and on the terms aforesaid. That is traversed by the statement of defence. It was specifically left to the jury who found that the statement of claim was not correct; that the plaintiffs had not employed the defendants, and that the defendants had not accepted that employment. One would have thought that that would have made an end of the case, but my

---

(1) 2 Camp. 597.

(2) 4 Camp. 349.

(3) Law Rep. 7 H. L. 757.

(4) 13 Ch. D. 708.

(5) Law Rep. 6 Ch. 632.

(6) 4 Ch. D. 123.

(7) 2 W. & T. 5th ed. 770, 771.

Brother Field, notwithstanding that finding, felt himself bound to give judgment for the plaintiffs upon a ground upon which I really cannot agree with him. He found no fault with the verdict, and in my opinion the verdict was perfectly right, because the plaintiffs had employed Matthews & Thielman in Glasgow, upon certain terms, one of which was that they should be entitled to 3 per cent. commission, and that it should be a del credere commission, and Matthews & Thielman had employed the defendants in London to sell the cargoes of grain upon the terms of a 2 per cent., and not a del credere, commission. Therefore it is clear that the plaintiffs employed Matthews & Thielman upon one set of terms, and that Matthews & Thielman employed the defendants upon another and different set of terms. It was admitted that if the defendants had misconducted themselves in the sale of these cargoes, and had sold improperly, the plaintiffs could have brought no action against them for such misconduct, but must have sued Matthews & Thielman for not performing their duty by the sub-agents whom they employed. On the other hand, if the defendants had found it necessary to have brought an action for their commission they must have brought it not against the plaintiffs but against Matthews & Thielman. There was, therefore, no privity of contract between plaintiffs and defendants, and the verdict of the jury upon that point was quite right. Nevertheless my Brother Field thought he was bound to give judgment for the plaintiffs upon this principle. He said the defendants were sub-agents, and Matthews & Thielman had authority to employ sub-agents, and no doubt he was quite right as to that, because these cargoes were to be sold in London, and Matthews & Thielman carried on their business in Glasgow and not in London. Then he said it was the case of a principal and agent, and a principal can intervene in a contract which his broker and agent has made, and can sue the party with whom it has been made; that is to say, if a man employs another to sell goods, and that other sells the goods in his own name, the principal may intervene and bring his action against the buyer. There is no doubt about that, and why? Because a broker or agent who is so employed is employed to make the contract between the two principals and one of them may sue the other upon it. But in this case

Matthews & Thielman at Glasgow were not employed to make a contract of brokerage between the plaintiffs and defendants. It may have been no breach in their agreement with the plaintiffs to employ a sub-agent, but they had no authority to make a contract of agency between the two. I cannot agree, therefore, with the similitude which Mr. Justice Field made. Another illustration which the learned judge gave was this: "The owner of an estate in England employs a manager at a salary to realize the produce of his estate, leaving him absolute discretion as to the way in which he thinks it most advisable to realize, and the latter employs a broker, or factor, or agent on commission to effect the sale; but it cannot for a moment be supposed," says the learned judge, "that the original principal may not at any time before the sub-agent has accounted to the mesne agent, or paid over to him, or accounted for the proceeds of the sale (subject of course to any set-off accrued in ignorance that the mesne agent was not principal) intervene and claim the proceeds." I should say upon that statement the owner of an estate employs a manager to manage and not to sell, and one part of the manager's management was to employ a broker or agent for the purpose of selling the things that are to be sold, and therefore in that case the manager has authority to create the relation of principal and agent between the owner of the estate and the person he employs to sell.

I cannot agree with the conclusion that Mr. Justice Field has come to, that there was any contract of agency between the plaintiffs and the defendants. If there was, what were the terms of it? They were not the same as those between Matthews & Thielman and the defendants, for the plaintiffs never undertook to employ anybody otherwise than upon the terms of the del credere commission. It seems to me, therefore, that the judgment cannot be supported on that ground.

Then another point in the judgment is that the second finding of the jury (which I also think was a perfectly correct one), namely that the defendants knew, or had reason to believe, that Matthews & Thielman were acting as agents, was in the opinion of Mr. Justice Field rightly relied on by the counsel for the plaintiffs, as conclusively entitling the plaintiffs to judgment in respect of their

1881

NEW ZEALAND AND AUSTRALIAN LAND CO. v. WATSON.

Bramwell, L.J.

24 Ch D 81

rights as owners of the cargoes to follow the proceeds of their property in the hands of the defendants in their fiduciary character of agents and trustees. Now I do not desire to find fault with the various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions, and an agent in a commercial case turned into a trustee with all the troubles that attend that relation. I think there is no ground for holding that these defendants have any fiduciary character towards the plaintiffs. They are the sub-agents of Matthews & Thielman, and there is nothing in the nature of a trust that I can see in the case. Therefore, upon the two points that my Brother Field rested his judgment, I differ from him.

Mr. Barnes, who was for the plaintiffs, took an entirely new point before us which was this. He said the plaintiffs are the owners of this property and can therefore follow it into the hands of any person to whom they can trace it, and he based this right not merely on an equitable doctrine, but on a common law doctrine for which he cited authorities, and in this I agree with him. But the first observation I have to make upon it is that no such case as this is in the statement of claim, nor was it made before the jury or in the argument before Mr. Justice Field. If pleadings are to be of any use a man should be bound by the statement of his case, so that a defendant may know what he has got to answer. Otherwise pleadings are a snare and a delusion. I do not say that an application may not sometimes be properly made to the Court in which the record is, for leave to amend the statement of claim so as to raise a different question from that which is already in it, but I think it an inconvenient thing, when the question comes to be discussed before the Court of Appeal, that an entirely new point should then be raised for the first time. I am prepared therefore to decide this case upon the ground that this point is not in the statement of claim, and that it is not within the rule that allows an amendment necessary for the purpose of determining the matter in controversy between these parties, which is whether the defendants were the agents of the plaintiffs, not whether there was any such right as is now alleged on the part of the plaintiffs to follow the goods. I am, however, also prepared to decide this case upon the merits. I agree that goods and the produce of

24 Ch D 71

goods may be followed, and that before the defendants had sold these goods, and while they continued to hold the bills of lading for them, the plaintiffs might have claimed to have had those bills of lading handed over to them. Whether the defendants could have retained them for advances is a matter upon which one need express no opinion at present, because that was not the case; for what really happened was this, that they had sold the cargoes and the claim was not to have the bills of lading or the goods specifically restored, but the produce of them, and as to that the defendants would be only liable to account for what remained in their hands after adjusting their accounts with Matthews & Thielman. Now Matthews & Thielman carried on two businesses, one at Glasgow and the other at Leith, and they employed the defendants both in respect of their Glasgow business and their Leith business, and it so happened that when Matthews & Thielman stopped payment they were indebted to the defendants upon the Leith account, but not on the Glasgow account, whereupon the plaintiffs sought to have the produce of their goods at the hands of the defendants, leaving the defendants to go and prove as creditors against Matthews & Thielman for the balance which was due to them on the Leith account. It seems to me that the plaintiffs have no right to do so, and that therefore this last contention on the part of the plaintiffs fails, both because it was not raised by the pleadings and that, if it had been, it ought to have been decided on the merits in favour of the defendants. The judgment should therefore be reversed.

24 Ch.D. 81

BAGGALLAY, L.J. I am of the same opinion, and I should not have added anything to what has fallen from Bramwell, L.J., had it not been that a strong argument was based upon the decision in *Knatchbull* v. *Hallett.* (1) There is no question as regards the doctrine well known in Equity, which that case illustrates, with respect to property disposed of by persons standing in a fiduciary position, namely that such property, or the proceeds of it, can be followed if it can be identified, and it is also equally well known that there is no distinction as regards this doctrine between an express trustee or an agent or bailee standing in a

---

(1) 13 Ch. D. 696.

1881

NEW ZEALAND AND AUSTRALIAN LAND CO. v. WATSON.

similar fiduciary position. The mistake is in applying the principle of that case to the present case where there is no fiduciary relation as between the plaintiffs and defendants. The fiduciary relation which exists, if at all, was between the defendants and Matthews & Thielman.

BRAMWELL, L.J. Lord Justice Brett, who is absent, desired me to say he concurs in this judgment for the appellants.

Judgment reversed.

Solicitors for plaintiffs: *Young, Jones, Roberts, & Hale.*
Solicitors for defendants: *Stibbard, Gibson, & Co.*

W. P.

June 29.

THE QUEEN ON THE PROSECUTION OF THE GUARDIANS OF FULHAM UNION, APPELLANTS; THE GUARDIANS OF PORTSEA UNION, RESPONDENTS.

Poor Law—Illegitimate Child under Sixteen—Derivative Settlement—39 & 40 Vict. c. 61, s. 35.

9QBD782

Under 39 & 40 Vict. c. 61, s. 35, illegitimate children under sixteen do not take the settlement of their mother where such settlement has been derived from her marriage, although the birth of the children and the marriage of the mother were before the passing of the Act.

UPON appeal to the Portsmouth Borough Sessions, against an order for the removal of Maria Butler and Emily Butler from the Portsea Island Union, the order was quashed, subject to the following case.

The paupers, Maria and Emily Butler, are the illegitimate children of Emma Maria Savage, now Burdett, who was at the time of the paupers' birth, a single woman.

The paupers were both born in the parish of Portsea, within the respondent union. Maria, on the 6th of January, 1866, and Emily, the 11th of May, 1868.

The paupers have not since their birth acquired any settlement for themselves in their own right.

The paupers' parent, Emma Maria Savage, was on the 3rd of October, 1875, married to one John Burdett.

John Burdett, the paupers' parent's husband, was born on or about the 18th of November, 1850, at Bedford Place, in the parish of Fulham within the appellant union, and is now by virtue of such birth settled in the appellant union.

The appellants on the hearing of the appeal at the Court of quarter sessions, contended that the paupers were legally settled in the respondent union by their illegitimate birth, inasmuch as the settlement of their parent could not be shewn without inquiring into the derivative settlement of such parent as derived by her marriage with John Burdett, and as is prohibited by 39 & 40 Vict. c. 61, s. 35, limiting derivative settlements.

The respondents, on the other hand, contended that the settlement of the paupers was that of the mother, in the parish of Fulham, derived by her marriage on the 3rd of October, 1875, with the said John Burdett, such settlement having passed to the said pauper according to the then existing law, and before the passing of 39 & 40 Vict. c. 61, s. 35.

The question for the opinion of the Court is whether upon the above facts, the paupers are legally settled in the appellant or respondent union.

A. Collins, Q.C. (*Temple Cooke*, with him), for the appellants. There is no substantial distinction between this case and *Overseers of Manchester* v. *St. Pancras.* (1)

[He was stopped.]

A. Charles, Q.C. (*Bullen*, with him), for the respondents. The *Overseers of Manchester* v. *St. Pancras* (1) which decided that an illegitimate child under sixteen at the date of 39 & 40 Vict. c. 61, does not take the settlement of its mother where such settlement is derived from marriage, is inconsistent with the later case of *Hollingbourn Union* v. *West Ham Union* (2), where it was held that unemancipated children under sixteen follow the settlement of their widowed mother, although such settlement is a derivative settlement. There is no distinction between an unemancipated legitimate child under the first clause of s. 35 and an illegitimate child under the second clause. The general words in the last clause of s. 35, must be read subject to the operation of the particular provision in the first clause.

(1) 4 Q. B. D. 409.

(2) 6 Q. B. D. 580.

Secondly, this last clause is not in the present case retrospective: *Westbury-on-Severn* v. *Barrow-in-Furness* (1) was decided upon a different part of the section. The children were born before the Act, and under the then existing law, 4 & 5 Wm. 4, c. 76, s. 71, took on the marriage of their mother her derivative settlement. In *Reg.* v. *Ipswich Union* (2), it was held that s. 34, which relates to settlements by residence, was not retrospective, and in *Tenterden* v. *Guardians of St. Mary, Islington* (3), where an illegitimate child attained sixteen before the Act, it was held that s. 35 did not operate retrospectively.

Temple Cooke, in reply. There is no question of making the latter part of s. 35 retrospective. The new Act only makes it impossible for an illegitimate child to follow the settlement of its mother where such settlement is derived from her marriage.

POLLOCK, B. I think the order of the sessions was right. The question is one of some intricacy, owing in part to the language of the Act and in part to the different decisions which have been given upon it. It appears that these illegitimate children were born in 1866 and 1868 respectively, and that their mother married in the year 1875, a year before the passing of the Act. It was argued that, the mother having married and acquired a derivative settlement before the Act, the children then took her derivative settlement, and that s. 35, preventing such children from taking their parents' derivative settlement, is not retrospective. Now the word "retrospective" is capable of different meanings. In *Tenterden* v. *St. Mary, Islington* (3), the pauper, being above sixteen at the date of the Act, had ceased to have a derivative settlement, and was settled in the place of her birth, and it was held that the Act did not interfere with this settlement. To have decided otherwise would have been to give it literally and without limit a retrospective effect. But the present case is different, for although the marriage of the mother was before the passing of the Act, the children were illegitimate children, who would, as the law stood, only retain the settlement of the mother until they were sixteen, or had acquired a settlement in their own right.

---

(1) 3 Ex. D. 88.

(2) 2 Q. B. D. 269.

(3) 47 L. J. (M.C.) 81.

1881

THE QUEEN
v.
GUARDIANS OF
PORTSEA.

I do not think it necessary to refer fully to *Hollingbourn Union* v. *West Ham Union* (1), for it was decided upon considerations which do not arise here. There is no material difference between this case and *Overseers of Manchester* v. *St. Pancras* (2), and we must follow that decision.

MANISTY, J. I am of the same opinion. The *Overseers of Manchester* v. *St. Pancras* (2) governs this case, except as to the point which has been raised that the latter part of s. 35 is not, in the present case, retrospective, inasmuch as the mother of the pauper children married, and they, according to the then existing law, took her derivative settlement before the passing of the Act. But I think that s. 35 must be read with s. 36, which enacts that the provisions relating to settlement shall not apply to any pauper removed under any order of removal before the passing of the Act, or in respect of whom any order of removal shall be pending at the passing of the Act. Therefore, except where such an order has been made, or is pending, the law is to be administered according to s. 35, and there is to be no inquiry into the derivative settlement of the mother. The children are to retain the settlement of the mother until they acquire another, but here they can acquire no settlement from her unless inquiry is made into her derivative settlement, which cannot be done. The order of removal was wrong, and the Sessions were right.

Judgment for the appellants; Order of Sessions confirmed.

Solicitors for appellants: *Rexworthy, Oswell & Co.*
Solicitors for respondents: *Sole, Turner, & Knight.*

---

(1) 6 Q. B. D. 580.

(2) 4 Q. B. D. 409.

A. P. S.

1881
June 27.

SAUNDERS, Appellant; RICHARDSON, Respondent.

Elementary Education—Attendance Order—Child attending Board School without Fees—Liability of Parent—33 & 34 *Vict. c.* 75, *s.* 17; 39 & 40 *Vict. c.* 79, *ss.* 10, 11, 12; 43 & 44 Vict. c. 23, s. 4.

9 QBD 262

A parent who, under an order by a court of summary jurisdiction that his child shall attend a board school, and that he do see that the order is complied with, causes the child to attend school, but without the school fees, and without having applied to the guardians under 33 & 34 Vict. c. 75, for payment of such fees, or to the school board under s. 17 for a remission of them, is liable to be convicted under the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 12, for non-compliance with the order.

Richardson v. *Saunders* (6 Q. B. D. 313) overruled.

In re Murphy (2 Q. B. D. 397) discussed.

Case stated by justices under 42 & 43 Vict. c. 49, s. 33.

An information was preferred by the appellant on behalf of the school board of the parish of Belgrave, Leicester, under the by-laws made by the school board in pursuance of the powers conferred upon them by s. 74 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), as amended by the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), against the respondent, on the ground that, on the 1st of March, 1881, the respondent then being the parent of a child aged seven years, residing within the said parish, and subject to the provisions of the Elementary Education Acts, unlawfully did not cause the child to attend school as required by the by-laws of the school board.

The facts were as follows:—

By the by-laws of the Belgrave School Board, it is provided that "The parent of every child not less than five nor more than thirteen years of age, shall cause such child to attend school, unless there be a reasonable cause for non-attendance. Any of the following reasons shall be a reasonable excuse, viz., (*a*) that the child is under efficient instruction in some other manner; (*b*) that the child has been prevented from attending school by sickness or any unavoidable cause; (*c*) that there is no public elementary school open which the child can attend within two miles from the residence of such child."

In the by-laws the word "attendance" is defined to mean an attendance at a morning or afternoon meeting as defined by the Code of 1876.

By the Code of Minutes of the Education Department, 1876, attendance at a morning or afternoon meeting may not be reckoned for any scholar who has been under instruction in secular subjects less than two hours if above, or one hour and a half if under, seven years of age. The respondent had, pursuant to an attendance order made by the magistrates on the application of the appellant, sent his child to the Belgrave board school on and regularly since the 21st of August, 1880, to request that she might be admitted and instructed, and the child duly presented itself for that purpose.

The child had been refused admission to the school in consequence of the respondent not having sent with the child the school fees payable by each child attending the school.

The justices being of opinion that they were bound by the decision of the Queen's Bench Division (between the same parties) in *Richardson* v. *Saunders* (1) dismissed the information.

The questions for the opinion of the Court are: 1, Whether the respondent had caused the child to attend school as required by the by-laws of the school board of the parish of Belgrave? 2, Whether in view of the decision in *Richardson* v. *Saunders* (1) the respondent could be held responsible for the omission of the school board to give instruction to the child, or to allow her to remain at the board school for the period of time stipulated for by the Codes of 1876 and 1878?

The case first came on for argument before Lord Coleridge, C.J., and Manisty, J., and was ordered to be re-argued before the present Court, consisting of five judges.

Sir H. James, A.G. (*Sir F. Herschell, S.G.*, and *A. L. Smith,* with him), for the appellant.

Hensman, for the respondent.

The nature of the arguments sufficiently appears from the judgments.

LORD COLERIDGE, C.J. In this case we are called upon to

(1) 6 Q. B. D. 313.

determine a matter of importance to school boards throughout the country, and the two questions are: First, whether the father of a child who has conducted himself in the way I will presently describe has caused his child to attend school as required by the by-laws; and secondly, whether after the decision in *Richardson* v. *Saunders* (1) he, the father, can be held responsible because the school board refused, having regard to his conduct, to give instruction to his child, or to allow her to remain in the school for the period of time stipulated by the Codes of 1876 and 1878. The facts are, that Richardson, the father of the child, is a poor man, and that he cannot, and could not at the time of either of the proceedings which have been taken against him, provide the necessary fees for the education of his child in the school board school. It is found also that he neither applied to have the fees remitted nor applied to the guardians to have them paid for him. Application was made for an attendance order to compel him to send his child to the school board school, and he did send his child in one sense, that is, he sent it to the door of the school, but as the rule in that district, prescribed by the school board with the sanction of the Education Department, had been that the fees for attendance should be brought by the child on its attendance, the child was refused admission, and therefore the question is whether he has, under the circumstances, committed an offence against the by-law, and whether the magistrates were right in refusing to convict him under these circumstances.

The by-law which is said to have been contravened is this: "That the parent of every child of not less than five nor more than thirteen years of age shall cause such child to attend school unless there be a reasonable cause for non-attendance." The first thing to see is whether there was authority to make this by-law, and it is clear that the Act 33 & 34 Vict. c. 75, gives this power. Then the question is has the by-law been complied with? The by-law goes on to define what "attendance" is, and after having enacted that every parent shall cause the child to attend, it defines the attendance to mean an attendance at a morning or afternoon meeting as defined by the Code of 1876. Upon reference to this Code, it appears that a morning meeting is to last two hours, and an afternoon meeting for one hour and-a-half. Now it is clear that the child never attended at any meeting whatever. The child went to the door and was refused at the door, and never went into the school at all. Is this causing the child to attend school? We must consider the different sections. It may seem illogical to refer to the Act of 1876 (39 & 40 Vict. c. 79) for the purpose of interpreting a by-law made under the Act of 1870, but it is provided that the two Acts are to be construed together, so that whatever the words "to attend" mean in the Act of 1876 they must mean in the Act of 1870. Now the duty in respect to education is imposed by the 4th section of the Act of 1876. "It shall be the duty of the parent of every child to cause such child to receive efficient elementary instruction in reading, writing, and arithmetic, and if such parent fail to perform such duty he shall be liable to such orders and penalties as are provided by this Act." Then by s. 11 it is provided that if "the parent of any child" habitually and without reasonable excuse neglects to provide efficient elementary instruction for his child, it shall be the duty of the local authority, after due warning to the parent, to complain to a court of summary jurisdiction, and such court may, "if satisfied of the truth of such complaint, order that the child do attend some certified efficient school willing to receive him and named in the order," and an order under this section is to be referred to as an "attendance order." The mischief to be remedied is the neglect to provide efficient elementary instruction, the remedy for the evil is to send the child to school under an attendance order. The evil and the remedy are co-extensive. Is efficient elementary instruction provided by sending a child to the door of a school under circumstances which the person who sends the child knows will prevent its admission into the school, and which he knows that he has the means of remedying? I think clearly not.

---

(1) 6 Q. B. D. 313.

In the first place we find that s. 11 defines "reasonable excuse" for not providing efficient elementary instruction to be the fact of there being no school within two miles, or "where the absence of the child from school has been caused by sickness or any unavoidable cause," and this reasonable excuse ought no doubt to prevent an attendance order from being made.

The next section deals with the case of non-compliance with an attendance order. A penalty is imposed if the parent of the child does not appear, or appears and fails to satisfy the Court that he has used all reasonable efforts to comply with the order. Now what are the reasonable efforts pointed out in the case where the parent cannot pay the fees? Either to go to the school board and say, "I am too poor, remit me the payment," or to go to the guardians and say, "I am too poor, the school board will not pay the threepence a week which the Act of Parliament authorizes you to charge from the general rates for it." Unless he has taken these steps, I cannot think that he has made the reasonable efforts to fulfil his duties which the Act requires.

I proceed to consider the objections which have been taken. First, it is said the proceeding is under the by-law, and nothing is said in the by-law as to any duty to pay fees at all, and therefore the non-payment of them is no breach of the Act. There can be no doubt that the imposition of fees is not one of the purposes for which by-laws may be made under s. 74 of the Act of 1870. But by s. 17 every child shall pay such weekly fees as are prescribed by the school board with the sanction of the Education Department, and the section goes on to provide that if the school board are of opinion that the parent cannot pay the fees he may be relieved from payment in a specified manner. Therefore the board have express power to prescribe fees, and it is found in the case that the fees were payable, which must mean payable by law. The fees, therefore, are parliamentary fees and their payment a condition precedent to the child entering the school, and but for two cases I should say there was nothing to interfere with the operation of this order. The first is *Re Murphy* (1), where no doubt there are expressions in the judgment of Cockburn, C.J., which go to shew that in his view the facts of this case constitute an offence under s. 11 of the Act of 1876 rather than under the by-law. But assuming this to be the decision, the Act of 1880 (43 & 44 Vict. c. 23), s. 4, must be taken to have altered the law as laid down in that case.

With regard to *Richardson* v. *Saunders* (2), that is the case which has led to the formation of the present Court. It could

(1) 2 Q. B. D. 397.

(2) 6 Q. B. D. 313.

scarcely have been distinguished from the present case, and as there was no appeal and the Judicature Act allows any number of judges to hear a case when the occasion arises, we directed that there should be a kind of rehearing by a Court consisting of five members other than those who decided *Richardson* v. *Saunders.* (1) In the result, I am bound to say that I do not agree with *Richardson* v. *Saunders* (1), and think that it was wrongly decided. The judges in that case undoubtedly held (it was not a conviction under the by-law, but a conviction under s. 12 of the Act of 1876) that an attendance order was satisfied by physical attendance at the door of the school. For the reasons which I have given I think that "attend" under s. 11, and "attend" under the by-laws mean effective attendance, and that it is not satisfied by merely sending a child to the door of the school. It is idle to shut our eyes to the fact that the more limited construction would enable many unwilling parents to keep their children uneducated, by doing nothing but sending them to the door of the school under conditions which it is well known would prevent their being taken in.

DENMAN, J. I also think that this appeal should be allowed. I shall add very few words, but I wish to say that I consider that the decision in *Richardson* v. *Saunders* (1) was based upon one error, which appears in the judgment of my Brother Lindley. The learned judge lays it down that the word "attend" has its primâ facie meaning, and that the Act means no more than that you shall send the child to school, in the sense that the child is to be sent physically to the school door. My Brother Lopes in giving his judgment says, "We are asked to say that the word 'attend' in the statute does not mean 'attend' in the ordinary sense of the word;" and he says afterwards, "I think that 'cause to attend' means 'send to school,' and nothing more." Now applying the test which my Brother Lindley himself applies that the words are to have their primâ facie meaning, it does appear to me, I must confess, that the primâ facie meaning of the word "attend," having regard to the words with which it is used in the sections which we have been discussing, is not that which has been put upon it by my learned Brethren in *Richardson* v. *Saunders* (1), and that the words "attend school" do not mean merely sending the child to the school door with the certainty of its being sent away, but sending it to the school door under such circumstances as that the person who sends the child can have reasonable ground to suppose that he is doing his duty within the Act. According to my understanding of the word "attend," and of the meaning of the words "attend school," it means a totally different thing from what was done here. There has been an attendance order, and no reasonable excuse why the parent has not complied with it is shewn. Sect. 12 of 39 & 40 Vict. c. 79, shews that by "reasonable excuse" is meant that he shall use his best endeavours, and make all reasonable efforts. Here the parent has done nothing. He has neither applied for the fees to be remitted, nor gone to the guardians to obtain the money, and yet he contends that this is a compliance with the words "attend school." The point has been thought to be of sufficient importance to summon a Court of five members to decide it, and as one of such members I am clearly of opinion that the father has not complied with the order.

---

(1) 6 Q. B. D. 313.

POLLOCK, B. I concur entirely in the conclusion at which my Lord and my Brother Denman have arrived. It has been argued that the payment of fees has to be looked to as a matter entirely distinct from the attendance; and that the parent may send his child to school, and may be taken to have sent that child in such a manner as to secure attendance, although he has not paid the fees. That view has been to a certain extent adopted by my learned Brethren in *Richardson* v. *Saunders* (1), and by the same process of reasoning they were driven to the conclusion that there had been an omission in the Act of 1870 with regard to any provision enforcing the payment of fees, so that these fees could only be recovered by an action. I cannot say that I adopt that view, because when the Act of 1870 was passed the legislature was dealing with a known existing state of things, that was, the existence of a class of schools which forms by far the larger proportion of the schools in this country. Dealing with this fact, and knowing that in each of this class of schools the payments were made by children week by week beforehand, or sometimes day by day, the Act of 1870 by s. 17 declared that every child attending a school provided by any school board should pay such weekly fee as should be prescribed by the school board. I cannot myself suppose that under such circumstances the section intended to say that a child is to go to school, and thereby the parent at the end of each week is to be made liable to a payment for the schooling. I think it meant that the child should pay such a weekly fee in such a manner as has been the custom throughout the schools of England which have hitherto been under Government superintendence. This clears up any difficulty with regard to paying the fees. Once admit that the fee becomes payable when the child goes, and this becomes a condition precedent to the attendance of the child.

---

(1) 6 Q. B. D. 313.

MANISTY, J. This information is founded upon the by-law. It is for a breach of the by-law and not a proceeding under s. 11 of the Act of 1876. By s. 74 of the Act of 1870, every school board may make by-laws for, among other things, requiring the parents of children of a certain age, unless there be reasonable excuse to do, what? To attend school, not to attend at the school-house, but to attend school. Now what says the by-law. The by-law is to this effect, "The parent of every child" of a specified age, "shall cause such child to attend school," and the information is for not causing the child to attend school. To "attend school" involves of course the payment of fees, and then came a more stringent provision. If a parent habitually omits to provide efficient elementary instruction, then, under the Act of 1876, you get an attendance order, and the proceeding to enforce it under s. 12, and no doubt a difficulty was presented to us which has been cleared up by the Attorney-General referring to the Act of last year. The difficulty presented to us here was two modes of proceeding, one for a breach of the attendance order under s. 11 of the Act of 1876, and our attention was called most properly to the case of *Re Murphy* (1) to the effect that if the circumstances shew that there has been a breach of duty under s. 11 of the Act of 1876, it is not within the discretion of the school board to proceed under the Act of 1870, and also to proceed for breach of the by-law. But then that difficulty is entirely removed by the enactment of the statute of last year, 43 & 44 Vict. c. 23, s. 4, which is in few words and directly in point: "Proceedings may in the discretion of the local authority, or person instituting the same, be taken for punishing the contravention of a by-law" (that is this case) "notwithstanding the act alleged constitutes habitual neglect to provide efficient elementary instruction within the meaning of s. 11 of the Act of 1876," directly in terms meeting the case. Therefore it is unnecessary to consider whether the decision in *Re Murphy* (1) was correct or not, because the legislature has now expressly given discretionary power to proceed for breach of the by-law or for habitual neglect under s. 11 of the Act of 1876. I think this case sufficiently finds that fees were payable and that they were not paid.

---

(1) 2 Q. B. D. 397.

Then it is said "what a hard thing upon this man who has been acting upon the notion that the case decided by two learned judges was law." Any hardship of that sort, no doubt, the magistrate will take into account. He can easily impose a nominal fine if he thinks right, and as the costs are absolutely in his discretion there need be no hardship.

WATKIN WILLIAMS, J. I entertain no doubt that the question submitted to the Court should be answered in favour of the appellant and, considering the circumstances under which this case has been brought before the Court, I think it right to express my separate and individual opinion upon the question. The question submitted to the Court is whether the respondent has caused his child to attend school as required by the by-laws of the school board. This is the by-law: "The parent of every child of not less than five nor more than thirteen years of age shall cause such child to attend school unless there be a reasonable cause for non-attendance." Now, in order to cause a child effectually to attend school, so as to obtain the instruction given in the school, a parent may find it necessary to do a variety of things, and included in those things there is not only the causing of the physical presence of the child at the place where a school is held, but also paying

(1) 2 Q. B. D. 397.

or making provision for the payment of school fees if any are required, or obtaining exemption from such payment, and if the parent fails in the performance of these or any of these conditions precedent the result is that the child cannot and does not attend a school so as to obtain the instruction therein, and the question then arises whether, if the parent omits or fails to fulfil and perform one of the essential conditions of admittance into the school and attendance therein, and if in consequence of such failure or omission the attendance becomes abortive and the child is not admitted to the instruction given in the school, can it be said in such a case that a parent has caused the child to attend school within the meaning of the by-law? I am clearly of opinion that it cannot. In such a case he has failed to cause the child to attend school. To attend school, or attendance at school, seems to me clearly to mean attendance in fact and efficiently in school so as to receive the instruction given in the school, and is not satisfied by an abortive and ineffectual attempt to attend. This seems to be the plain and natural meaning of the words, and to give the words the narrower and more restricted meaning of mere physical presence at the school door, would in my judgment be to stultify the Act and render its provisions nugatory. Nor is there any hardship in this construction of the statute, because if the parent can shew any reasonable excuse for not complying with this direction, then he can be excused and no penalty will be inflicted upon him.

Judgment for the appellant.

Solicitor for appellant: *The Solicitor to the Treasury.*
Solicitor for respondent: *H. Montagu, for T. Wright, Leicester.*

A. P. S.

1881
Aug. 1.

THE QUEEN ON THE PROSECUTION OF ASTIN *v.* HANDSLEY AND OTHERS, JUSTICES OF THE BOROUGH OF BURNLEY.

Poor-rate—Distress Warrant—Power of Justices to delay Execution.

Justices in issuing a distress warrant for the recovery of poor-rates have no power to order that there shall be any delay in the execution of the warrant.

Rule calling upon R. Handsley, Esq., and others, justices of the Borough of Burnley, Lancaster, to shew cause why a mandamus should not issue, commanding them to grant a distress warrant upon the goods of W. Whitaker in respect of poor-rates for the borough.

It appeared upon affidavit, that Whitaker having been summoned to shew cause why he should not pay 6*s.* 6*d.* due from him for poor-rate, his wife appeared and stated that her husband was unable to pay owing to his being ill and out of work, but that she would be able to pay the rate within a month. The overseer thereupon applied to the justices for a distress warrant. The justices granted the warrant but directed their clerk to keep it in his possession for three months, and not to cause the goods of Whitaker to be taken in execution until the expiration of that time.

Atherley-Jones, shewed cause. What the justices did was tantamount to ordering an adjournment of the case. The power to delay the execution of the warrant is in fact implied in the jurisdiction to grant it.

[Huddleston, B., referred to Corner's Crown Practice, p. 210. "The Court will not permit justices to annex conditions to the performance of their duty which the law does not warrant, and where magistrates refused to issue a distress warrant for levying a poor-rate unless an indemnity were given, the Court issued a mandamus commanding them to do so: *Reg.* v. *Middlesex.*" (1)]

In the present case the justices did not refuse the warrant.

---

(1) 12 L. J. (M.C.) 36.

Petheram, Q.C., and *R. H. Collins*, in support of the rule, were not heard.

FIELD, J. The rule must be made absolute. The justices upon due application for a distress warrant are bound to grant it and place it at the disposition of the overseers. They themselves have nothing to do but to act ministerially as a kind of sheriff in the execution of the process. The case of *Reg.* v. *Middlesex* (1), referred to by my Brother Huddleston, seems to me a direct authority against the course taken by the justices. I think they had no jurisdiction to interpose any delay in the execution of the warrant.

HUDDLESTON, B. I also have no doubt that the mandamus must go. There can be no doubt that the justices act ministerially and not judicially. It is most important that these warrants should be put in force without delay, otherwise the ratepayers in default would remove their goods and go out of the parish, and thereby throw a heavier burden upon those who have not neglected their liabilities.

Rule absolute.

Solicitors for prosecution: *Warriner & Cross.*
Solicitors for defendants: *Johnson & Weatherall.*

(1) 12 L. J. (M.C.) 36.

A. P. S.

1881
March 16.

[IN THE COURT OF APPEAL.]

BEWICKE *v.* GRAHAM AND ANOTHER.

Practice — Discovery and Inspection — Affidavit of Documents — Privilege — Order XXXI., rr. 11, 12.

10 QBD 193
196, 201

The defendants in an affidavit of documents made pursuant to Order XXXI., rule 12, stated as follows:—"We have in our possession or power certain documents numbered 101 to 110 inclusive, which are tied up in a bundle marked with the letter A., and initialed by the deponent" C. G.; "the said documents relate solely to the case of the defendants and not to the case of the plaintiff, nor do they tend to support it, and they do not, to the best of our knowledge, information, and belief, contain anything impeaching the case of the said defendants, wherefore we object to produce the same, and say they are privileged from production." A judge at chambers and the Divisional Court (W. Williams, J., dissenting) refused to order, under Order XXXI. rule 11, the production of the documents which the defendants so objected to produce:—

Held, by the Court of Appeal, that the affidavit sufficiently described such documents for the purpose of identification, and that as the affidavit was conclusive against the plaintiff seeking inspection, the judge and the Divisional Court rightly refused to order their production.

MOTION on appeal from a decision of Bowen, J., at chambers reversing an order of a Master, under Order XXXI. rule 11, for production by the defendants of documents which the defendants referred to in their affidavit of discovery under Order XXXI., rule 12, thus:—"We have in our possession or power certain documents, numbered 101 to 110 inclusive, which are tied up in a bundle marked with the letter A., and initialed by the deponent Charles Granville; the said documents relate solely to the case of the said defendants and not to the case of the plaintiff, nor do they tend to support it, and they do not, to the best of our knowledge, information, and belief, contain anything impeaching the case of the said defendants, wherefore we object to produce the same, and say they are privileged from production."

The action was by the indorsee against acceptors of a bill of exchange.

March 8, 9. *Macrae*, for the plaintiff, moved to reverse the decision of Bowen, J.

The affidavit of the defendants does not deny that the documents are relevant to the issue, they must therefore be produced. [He was stopped.]

H. D. Greene, for the defendants. The affidavit states that the documents relate solely to the case of the defendants, and contain nothing to impeach it. The defendants are therefore entitled to rely on the affidavit, which is conclusive: *Jones* v. *Monte Video Gas Co.* (1), and to refuse inspection: *Minet* v. *Morgan.* (2) The rules of the Court of Chancery as to the production of documents still apply notwithstanding the Judicature Acts: *Bustros* v. *White* (3); *Anderson* v. *Bank of British Columbia.* (4) [He was stopped.]

Macrae, for the plaintiff. The affidavit must shew the nature of the documents so that the Court may judge whether the objection to produce them is reasonable. In *Felkin* v. *Lord Herbert* (5), the defendant swore that they did not relate to the title of the plaintiff or his predecessors, but he was ordered to produce the documents. In *Taylor* v. *Batten* (6) the documents were sufficiently described to shew they were privileged. In *Bustros* v. *White* (3) production was ordered, though an affidavit was made against it on behalf of the plaintiffs, stating that the letters related only to the plaintiffs' case and not to the defendant's case.

[WATKIN WILLIAMS, J. The letters were known by the advisers of the plaintiffs to assist the defendant and be fatal to the case of the plaintiffs, and therefore no allegation that the letters did not assist the defendant was made in the affidavit.]

In *Jones* v. *Monte Video Gas Co.* (1) the allegation was that the documents were not material or relevant to the action. But if it be admitted that they are material, then the mere oath that they do not help the opposite party is not enough. Here, "as it is admitted, they relate to the matters in dispute, the plaintiffs, unless there be some other objection, are entitled to see them in order to form their own opinion whether they do or do not make out or help to make out their title:" per Lord Cranworth, V.C., *Goodall* v. *Little* (8), "The general rule is, that when once it is admitted that the documents relate to the matters in question in the suit, they must be produced, unless they manifestly can have no bearing upon the issue." Daniel's Chancery Practice, vol. 2, 5th ed., p. 1687, citing *Mansell* v. *Feeney* (No. 2) (1), although there is no doubt a qualification at p. 1691 that "if it be, with distinctness and positiveness stated in an answer that a document forms or supports the defendant's title, and is intended to be or may be used by him in evidence accordingly, and does not contain anything impeaching his defence, or forming or supporting the plaintiff's title or the plaintiff's case that document is, I conceive, protected from production, unless the Court sees, upon the answer itself, that the defendant erroneously represents or misconceives its nature:" per Sir J. L. Knight-Bruce, V.C., in *Combe* v. *Corporation of London.* (2) "On the other hand, there is a well-established rule that discovery of the nature of the case that is to be made against you and of the written documents in the possession of the parties in support of that case, should be allowed to both sides," per Jessel, M.R., in *Benbow* v. *Low.* (3)

---

(1) 5 Q. B. D. 556.

(2) Law Rep. 8 Ch. 361.

(3) 1 Q. B. D. 423.

(4) 2 Ch. D. 644.

(5) 30 L. J. (Ch.) 798.

(6) 4 Q. B. D. 85.

(7) 20 L. J. (Ch.) 132.

Here the documents relate to the matters in issue and may tend to make out the plaintiff's case, and therefore should be produced: *Jenkins* v. *Bushby.* (4) If they were title-deeds the affidavit might suffice, but they are not alleged to be title-deeds and there is a material distinction between those and other documents: see per Pollock, C.B.: *Adams* v. *Lloyd.* (5)

In all the cases cited, except *Combe* v. *Corporation of London* (2) and *Bolton* v. *Corporation of Liverpool* (6), the documents protected were title-deeds, and in those two cases the documents shewed rights to corporate dues and were therefore analogous to title-deeds.

H. D. Greene, for the defendants. The reference to the documents in the affidavit is sufficient. If a document is privileged from production the whole, including the title and date, is privileged. Otherwise if titles and dates of deeds were disclosed an astute conveyancer might find out the effect of them.

The doctrine of privilege is not limited to instruments affecting realty. "The word 'title' produces confusion, because in many cases it is not a question of title at all, and the proposition ought to be that a plaintiff is not entitled to see any document that does not tend to make out his case," per Kindersley, V.C., in *Jenkins* v. *Bushby.* (1) Formerly a party to an action at law could not give evidence. Equity relieved him by giving him a right to discovery of documents which would help his case. But that principle should not be extended to documents which do not help his case. The affidavit is in conformity with *Taylor* v. *Batten* (2) and *Minet* v. *Morgan.* (3)

---

(1) 2 J. & H. 320.
(2) 1 Y. & C. Ch. 631, 651.
(3) 50 L. J. (Ch.) 35, at p. 36.
16 Ch. D. 93.
(4) 35 L. J. (Ch.) 400.
(5) 3 H. & N. 351. 4 Jur. N.S.
(6) 1 My. & K. 88.

(4) L.R. 2 Eq. 527

Macrae, in reply.

WATKIN WILLIAMS, J. In my opinion, the order of Bowen, J. ought to be reversed. The application was one made on behalf of the plaintiff for an order directing the defendants to produce for the inspection of the plaintiff certain documents, admitted by the defendants to be in their possession and to be relevant to the questions in issue in the cause, but the production of which they resisted, upon the ground that they were privileged from inspection. The defendants had already filed an affidavit discovering the documents in question, in obedience to an order of a judge made under Order XXXI. rule 12, directing the defendants to make discovery on oath of all documents which were or had been in their possession or power relating to the matters in question in the action, and in that affidavit they thus described them. [The learned judge read the affidavit.] The present application is not for an order for a further affidavit of discovery of documents, but for an order to produce for inspection relevant documents known to be in the defendants' possession; and this distinction is material in considering the present question. The true question turns upon what are the principles of law to be applied in carrying out the provisions of rule 11 of Order XXXI., when privilege is claimed for the non-production of relevant documents for inspection. All that appears in the case is that the action is brought by the indorsee against acceptors of a bill of exchange, and that the defence is rested in part upon absence of consideration and fraud, and the defendants swear that the documents in question relate exclusively to their case and do not support that of the plaintiff. It appears to me that the materials relied upon by the defendants are not sufficient to protect the documents from production. The case of *Jones* v. *Monte Video Gas Co.* (1) in the Court of Appeal, which was relied upon by the defendants, seems to me to be no authority upon the question. That was an application for an order under rule 12, directing the defendants to make a further affidavit of discovery of documents, they having already made an affidavit in obedience to a similar order that no document in their possession, except those set forth in the schedule thereto, related to the matters in dispute. The Court of Appeal decided that the defendants having sworn such an affidavit, it was decisive, and that they would not be ordered to make another. This decision, which is in accordance with the practice so long as I can recollect it, is really founded not upon any artificial or arbitrary rule of the Courts, but upon the very nature of things. If a defendant swears that none of the documents in his possession, except those enumerated in the schedule, are relevant or material to the question in dispute, or, to test the point more closely, if the defendant swears that a particular known document does not relate to the matters in issue, how can any Court order him to swear that it does relate to the matters in dispute, he at the same time protesting and swearing that it does not; the Court may, no doubt, afford to either party who has made an imperfect and erroneous affidavit of discovery a locus penitentiæ, and direct him to file a further and better affidavit, but it is obviously beyond the power of any Court to order any party to swear to particular facts when he is determined to swear the contrary, and this is the true principle and real foundation of the rule in *Jones* v. *Monte Video Gas Co.* (1) This principle is not applicable to the case of an order to produce documents for inspection. In such case, starting with the assumption that the documents, the production of which is sought by the one and resisted by the other, are relevant and material to the questions at issue in the cause, there may well be a conflict between the parties as to the character and effect of the documents and as to the manner in which they bear upon the questions in issue; and in this conflict it seems to me that the Court is bound to apply the ordinary rules of evidence in determining whether a case of privilege has been established, and it is possible to conceive, and I have known cases in which a judge, having refused to order a defendant to make a further affidavit of discovery upon this ground, has nevertheless ordered the production of the controverted document, being satisfied that it was relevant to the case. It seems to me that the defendants, who admit the possession of the documents and their relevancy, have failed to shew that they come within any class of documents privileged from inspection. The defendants might have shewn what the nature of the controversy was and that the documents in question were of a class coming within one of the established exceptions entitling them to be privileged, but the defendants do not do so, and content themselves with a wide, general, and vague statement that the documents relate exclusively to the case of the defendants and not to that of the plaintiff. In the case of *Ebsworth* v. *Alliance Marine Insurance Co.* (not reported on this point), the defendants successfully resisted an application to inspect documents in their possession admittedly relevant to the case. That was an action upon a policy of marine insurance upon a cargo of cotton. The defence was that the ship had been fraudulently destroyed by fire and that the cotton had never been in fact shipped, but that bales of rubbish had been shipped in its place. The defendants pointed out on oath the nature of the dispute and the character of the documents sufficiently to enable the Court to test substantially the grounds of the claim of privilege upon sworn testimony which, if untrue, would have subjected the deponents to an indictment for perjury. In the same way, in *Bustros* v. *White* (1) where the privilege was disallowed, the party claiming the privilege sufficiently stated the character of the documents so as to enable the Court to judge of the validity of the claim. I think the defendants have not in this case placed before the Court the materials that they could and ought to have done, nor have they shewn any reason for not doing so, and I am of opinion, therefore, that their claim fails, and that the order for inspection ought to have been made.

---

(1) 35 L. J. (Ch.) 400. (2) 4 Q. B. D. 85. (3) Law Rep. 8 Ch. 361.

1 R Eq 567.

---

(1) 5 Q. B. D. 556.

(1) 1 Q. B. D. 423.

1881

BEWICKE
v.
GRAHAM.

POLLOCK, B. My conclusion in this case, which has been most carefully argued, is that the order of Bowen, J., was right. I am not at all certain what the best rule of practice would be if the Court had to lay it down for the first time in such a case. But it appears to me on the decisions, and also on the principles of the Courts of Equity which formerly alone had jurisdiction over the matter in question, that these documents are privileged from production. No doubt, especially after the judgment in *Jones* v. *Monte Video Gas Co.* (1), we are to be guided entirely by the construction of the present rules of practice. But in construing them it is impossible to forget that those rules were drawn from the practice of the Courts of Equity. As I understand the known practice of the Courts of Equity, there were many cases in which production of documents was asked for where the person seeking the assistance of the Court was bound by the oath of the defendant. And I find in no such case any distinction taken between the effect of the statement on oath as to the relevancy and of that as to the privileged nature of the documents. The only case, in which documents for which protection was so claimed were ordered to be produced, was where the person declining to produce them had waived his privilege, by referring to them in pleadings or affidavits so as to disclose the contents. The practice of the Court of Chancery is well-established, and is thus laid down in Wigram on Discovery, 2nd ed. at p. 299: "Where the documents are not referred to, but are admitted to be in the defendant's possession, then the question whether the defendant shall produce them or not is determined by considering whether the documents do or not relate to the title of the plaintiff. If they relate solely to the title of the defendant, in that case the order for production is not made." *Herbert* v. *Dean and Chapter of Westminster* (2) is cited by the author, and at p. 321 he further writes, that "it is clear that a plaintiff has no right to see any documents relating exclusively to the defendant's case, unless the latter, by his mode of pleading, concedes it to him."

No doubt, there is some difficulty in applying that class of cases in Equity on the production of documents to the cases at Common Law, because in Equity the documents in question have generally been muniments of title, not necessarily conveyances, but court rolls, or documents shewing payment of fines, or others in the nature of muniments of title. In those cases the nature of the documents is much more important in weight than that of mercantile documents, such as letters or accounts of freight. But in so far as any distinction arises between those classes of cases, it is in favour of the defendants, because in Equity this kind of distinction has often been drawn,—the party may be called on to state how he claims, viz., under a will or intestacy and so forth; but he has not been called on to produce the evidence to establish his case. Certainly in our Courts of Nisi Prius it would be contrary to principle to make a defendant produce documents which, though not muniments of title, are documents not in favour of the plaintiff but of the defendant, who is entitled to produce them for the first time in court. Let me turn now to *Jones* v. *Monte Video Gas Co.* (1) That was not a case where one judge refused to make an order, but where two—my Brother Field and I—pressed by the hardship of denying production, made successive orders (which, under the circumstances, were upheld by the Queen's Bench Division on appeal) requiring the production of documents, but upon an affidavit made by the plaintiff in order to shew that what was stated by the defendant in his affidavit was false. Was that right or wrong? It seemed to me a convenient course in such a case, but the Court of Appeal said that it was directly contrary to the rule as to production of documents under the new system, and that conclusion was arrived at after consideration by all the judges of the Court of Appeal. The only distinction between that case and the present case is that in *Jones* v. *Monte Video Gas Co.* (1) the ground on which production was declined was that the documents were said to be not material or relevant to the action. Here the defendants say that the documents relate solely to their case. Considering how long the practice of production of documents has existed, it is strange that no such distinction as that relied on by Mr. Macrae is indicated in any case which could be cited. As to *Bustros* v. *White* (2), if taken without duly considering the judgment, I should be troubled by it. The question, however, did not turn on the affidavit, but on another point, viz., whether the particular documents, which were reports made about a cargo, came within any of the rules as to privileged communication. I feel myself bound by the decisions, and without saying whether there should be an alteration or not, I think it is better to adhere to the lines of practice already laid down.

---

(1) 5 Q. B. D. 556.

(2) 1 Y. & C. Ch. 103.

---

(1) 5 Q. B. D. 556.

(2) 1 Q. B. D. 423.

DENMAN, J. If this were a case in which there was no authority for either side, and we had to decide it simply by what we might conceive to be the true intention of the Judicature Act and Rules, I do not hesitate to say that my opinion would be in favour of the view taken by my Brother Watkin Williams in his judgment. But I cannot decide the case without taking into consideration several previous decisions on the question of inspection and discovery, and, although not without hesitation due to the difference of opinion on the Bench, I have come to the conclusion that we cannot consistently with the cases in the Court of Appeal reverse the decision of Bowen, J., at chambers. I will not go minutely into the cases, because the two views have been fully and clearly put by my learned Brothers beside me, but I will say a few words on two or three cases cited.

My Brother Watkin Williams thinks that *Jones* v. *Monte Video Gas Co.* (1) does not even bear on the subject. I cannot quite take that view, because there, though the decision turned on the affidavit which stated only that the documents were not material and relevant and did not go into the question before us, yet it is evident from the judgment that the Court laid down the principle that the party asking for discovery or inspection is bound by the oath of the opposite party, and, that oath being taken at his peril, the matter is concluded by it, not only as to discovery, but so far as the consequences are concerned, viz., inspection. Although it gives great advantages to a statement on oath which may be unscrupulous, and it may be unadvisable to give such weight to the oath of a party deeply interested, yet many inconveniences would follow from not adopting that rule. It must be remembered that the party asking for inspection is asking to do something inquisitorially, and therefore it is not unreasonable to call on him to support his right to do so. *Bustros* v. *White* (2) does not, I think, afford us any assistance. It is clear from the report and from the account of my Brother Watkin Williams, who was counsel in the case, that the present point did not arise, and that the whole question which arose and on which the judgment was given, was one of solicitor's privilege. *Taylor* v. *Batten* (1) is strongly in favour of the defendants. It practically gives this very form for resisting inspection. It holds that documents may be dealt with as in this case by tying them up in a bundle and initialing it, and the mode adopted in the present case is precisely similar.

---

(1) 5 Q. B. D. 556.

(2) 1 Q. B. D. 423.

I find also in Seton on Decrees, 4th ed. pp. 162, 163, which contains an admirable summary of all the cases on this subject, that the learned author considers that the party's own statement, although merely of knowledge, information, and belief, as to the nature of the deeds, is conclusive, if the party chooses to state in his affidavit that the documents relate to or are evidence of his title. *Jenkins* v. *Bushby* (2), the case before Kindersley, V.C., establishes that under the word "title" are not only to be included title-deeds in the ordinary sense of the words, but documents which tend to support the case only of the party refusing inspection. On the whole, therefore, with great hesitation as to the advantage of such a decision, I think the cases in Equity and since the Judicature Act do prevent us from saying that the judgment of Bowen, J., was wrong. The appeal must, therefore, be dismissed.

Appeal dismissed.

The plaintiff appealed.

J. R.

Macrae, for the plaintiff. It is admitted that according to *Taylor* v. *Batten* (1), the documents are sufficiently described in the affidavit for the purpose of identity. But the plaintiff is entitled to inspect every document mentioned in such affidavit, unless it be shewn to be privileged. There is nothing here to shew that these documents are so privileged: *Bustros* v. *White* (3); *Mansell* v. *Feeney* (4), and Daniel's Chancery Practice, vol. ii. 5th ed.,

---

(1) 4 Q. B. D. 85.

(2) 35 L. J. (Ch.) 400.

(3) 1 Q. B. D. 423.

(4) 2 J. & H. 320.

1028g 547

p. 1687. The case of *Jones* v. *Monte Video Gas Co.* (1) on which the majority of the judges in the Divisional Court acted, was very different from the present case. The question was there as to the sufficiency of the affidavit of discovery, and whether the plaintiff was entitled to have a further and better affidavit. Here the plaintiff is not asking for any further affidavits, but for the inspection of the documents referred to in the affidavit, and which are admitted by it to be in the defendants' possession. No doubt the defendants say in that affidavit that those documents relate solely to their case and not to the case of the plaintiff, but they do not say that the documents are not relevant, and the plaintiff is entitled to see them and judge for himself whether they are or are not relevant to his case; there is nothing stated in the affidavit which should protect the documents from production.

Bagshawe, Q.C., and *H. D. Greene*, appeared for the defendants, but were not called on.

LORD COLERIDGE, C.J. I am of opinion that this appeal must fail, and that the order of the Divisional Court should be affirmed. I think that our decision may be put on Order XXXI. rule 11, itself which gives power to order the production of such of the documents "as the Court or judge shall think right," and that we may say that we do not think it right to order the production of any of the documents sought to be inspected, and that the discretion of the judge and of the Court below was rightly exercised. That would be sufficient to dispose of this matter, but I am inclined go further and to say that it is concluded by what is laid down in *Jones* v. *Monte Video Gas Co.* (1) and *Taylor* v. *Batten.* (2) Now as I understand those cases the principle is this, that on an application for discovery or inspection, which, I apprehend are substantially the same thing, the applicant is bound by the affidavit made in answer to the application, if the documents referred to in it are sufficiently identified to enable the Court to order their production, should the Court think right to do so. Here the documents are sufficiently identified, for the affidavit in this respect is almost in the very words which were used, and held to be sufficient, in the affidavit in *Taylor* v. *Batten*. (1) Then that being so, these two cases to which I have referred shew that the party applying for inspection is bound by the oath of the other, and must take the description of the documents to be true as given in the affidavit. No doubt in those cases the order sought for was for an affidavit of documents in answer to an application for discovery and not for inspection, but I do not think that that makes any difference, for if the affidavit sufficiently describes the documents for the purpose of identification the other party can go no further, whether he seeks discovery or inspection. If these two cases of *Taylor* v. *Batten* (1) and *Jones* v. *Monte Video Gas Co.* (2) are inconsistent with what is laid down by Lord Hatherley in *Mansell* v. *Feeney* (3), then it is sufficient to say that they are later, and are also the decisions of the Court of Appeal. Therefore whether one looks at those cases and decides the present case on the ground on which they were decided, or on the ground that the Court or judge below exercised a proper discretion in the matter, I think on either ground the decision of the Court below should be affirmed.

---

(1) 5 Q. B. D. 556.

(2) 4 Q. B. D. 85.

BAGGALLAY, L.J. I also agree in thinking that the decision should be affirmed. Mr. Macrae has argued that the language used in the affidavit is not sufficient to entitle the defendants to the privilege which they claim. I think that the affidavit sufficiently describes the documents for the purpose of identification, and that as to that the case of *Taylor* v. *Batten* (1) is directly in point. As regards the claim of privilege from production, no doubt every material document must be produced, unless it be shewn to be privileged, and I am not aware of documents described as these are, being so. I may refer to *Anderson* v. *Bank of British Columbia* (4) as an instance in which a letter from a branch manager, in reply to a request from the manager of the bank to send full particulars of the whole transaction, was held not to be privileged. Still, on the whole, I think the Court below rightly decided this matter, as according to Order XXXI. rule 11, the order for production is only as the Court or judge should think

(1) 4 Q. B. D. 85.
(2) 5 Q. B. D. 556.
(3) 2 J. & H. 320.
(4) 2 Ch. D. 644.

1881

BEWICKE v. GRAHAM.

right. Here an affidavit for discovery having been applied for and made, and no further affidavit having been applied for, the affidavit made must be taken as true, and therefore it must be taken as is there stated that the documents do not relate to the plaintiff's case, or tend to support it. Under these circumstances I am of opinion that this is not a case in which the Court could think it right to order the production of the documents.

BRAMWELL, L.J. I agree that this decision of the Court below should be affirmed on the grounds given by the Lord Chief Justice. As I understand the cases, the affidavit must identify the documents, and if there be any objection to their production the affidavit must state it. Now, all that has been done by the affidavit in this case according to the decision in *Taylor* v. *Batten* (1), and I cannot see what more the defendants could have done. They might, no doubt, have given a more particular identification of the documents, but they could not have given a more certain one, and I think it more reasonable that they should, as they have done here, give the general rather than the particular identification, for they might otherwise have shewn the nature of the very documents which were entitled to be privileged from production.

Appeal dismissed.

Solicitor for plaintiff: *G. E. Kaye.*
Solicitors for defendants: *Prior, Bigg, & Co.*

W. P.

(1) 4 Q. B. D. 85.

[IN THE COURT OF APPEAL.]

1881
May 6.

BARTER & Co. *v.* DUBEUX & Co.

Practice—Action—Bankruptcy of Sole Defendant—Making Trustee a party to the Action—Rules of Court, 1875, *Order L., r.* 2.

8 QBD 452
452-6

After issue joined in an action by the indorsees against the acceptor of a bill of exchange, in which the defence was that the plaintiffs took the bill without value, and after notice that the defendant had been defrauded of it, the defendant, who was a sole defendant, filed a petition in liquidation, and a trustee was appointed. The Bankruptcy Court refused to restrain the action, but restrained the plaintiffs from enforcing any judgment they might obtain in the action either against the property or person of the debtor, and the trustee declined to admit the plaintiffs' claim:—

Held, that the Bankruptcy Court was the proper Court in which the plaintiffs ought to prove their debt, and that there was no ground for making an order under Order L., rule 2, that the trustee be made a party to the action or be served with notice thereof.

Action brought to recover 500*l.* 4*s.* 4*d.* due to the plaintiffs as holders of a bill of exchange accepted by the defendant, who was the sole defendant in the action, but traded under the style of "G. A. Dubeux & Co."

The defence was that the bill had been delivered by the defendant to the drawers to discount, that they had not done so, and that the plaintiffs took the bill without value and with notice that the defendant had been so defrauded. After issue had been joined in the action the defendant filed a petition in liquidation in the county court of Lancashire, holden at Liverpool, and subsequently John Sutherland Harmood Banner was appointed trustee under the liquidation proceedings. On his application several orders were made from time to time by the judge of the Liverpool county court restraining, for a limited time, further proceedings in the action, and ultimately, on the 13th of April last, the judge, refusing to further restrain the action, made an order that the plaintiffs should "be absolutely restrained from enforcing any judgment they might obtain in the said action either against the property or person of the said George A. Dubeux."

Afterwards Cave, J., at chambers, made an order by which he

1881

BARTER
v.
DUBEUX.

ordered the trustee to be made a party to the action or to be served with notice thereof, and further as follows: "if the trustee consents to be bound by the result of the trial for the purposes of proof, or to admit proof if tendered by the plaintiffs within four days the order be set aside."

Upon appeal to the Divisional Court this order was rescinded.

The plaintiffs appealed to this Court.

McLeod and *Hollams*, for the plaintiffs. The order making the trustee a party was rightly made by the learned judge in the exercise of his discretion under Order L., rule 2 (1), of the Rules of Court, 1875. The action does not abate by the bankruptcy of any of the parties (Order L., rule 1), but it is in the power of the Court of Bankruptcy "to restrain further proceedings in any action against the debtor in respect of any debt provable in bankruptcy" (Bankruptcy Act, 1869, 32 & 33 Vict. c. 71), s. 13. Here that Court, viz., the county court judge, did not think fit to restrain the action, but only to restrain the plaintiffs from enforcing any judgment they might obtain therein against the person or property of the debtor.

[BRETT, L.J. What judgment can you have against the trustee in the action?

COTTON, L.J. Why should the action go on when the plaintiffs cannot enforce any judgment against the person or property of the insolvent, who is the sole defendant in the action?]

The trustee has refused to admit the plaintiffs' debt, and it is therefore desired to get a judgment which should bind the trustee; for the Court of Appeal has recently held that the Court of Bankruptcy can go behind a judgment against the insolvent debtor and inquire into the consideration for the claim. (2) The order of Mr. Justice Cave provided that if the trustee would admit proof of the plaintiffs' debt the order making him a party should be set aside.

---

(1) Order L., rule 2: "In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law of any party to an action, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party to the action, or be served with notice thereof in such manner and form as hereinafter prescribed and on such terms as the Court or judge shall think just, and shall make such order for the disposal of the action as may be just."

(2) Reference was made in support of this to *Ex parte Banner, In re Blythe* (Weekly Notes, April 16, 1881).

[illegible] 17 ChD 480

[BRAMWELL, L.J. It did not make it obligatory on the plaintiffs to tender any proof.

BRETT, L.J. Is there any rule making the notice of the action binding on the trustee? If not, and neither the judgment nor the notice has any binding effect on him, what is the use of making him a party?]

The judgment would be one behind which he would not be able to go and the plaintiffs would establish proof of this debt without losing the benefit of the costs which have been already incurred. If the trustee were a party he might put in a statement of defence which might be better than that of the defendant. The case of *Eldridge* v. *Burgess* (1) shews that in the case of a plaintiff being insolvent, and the trustee not being joined, the action will be struck out of the list. *Chorlton* v. *Dickie* (2) is an instance of an action going on, after a defendant has become bankrupt, by an order of revivor substituting the trustee for such defendant.

[COTTON, L.J. There there were two defendants, and it was necessary to go on with the action against the solvent defendant.]

It is in the discretion of the judge to make the trustee a party, and there was good ground here for so exercising such discretion, especially as the county court judge had not thought proper to restrain the action but only to restrain enforcing the judgment, and the case of *Ex parte Mills, In re Manning* (3) shews that the county court judge was right in acting as he did.

A. Charles, Q.C., and *E. Crofton*, for the trustee, were not heard.

BRAMWELL, L.J. I am very clearly of opinion that the decision of the Divisional Court must be affirmed. I am not going to say that in no case can the trustee of a bankrupt be made a defendant; it is not necessary to do so, but here either no judgment can be

---

upon which Bramwell, L.J., remarked that the Lord Chancellor has stated that cases in the Weekly Notes can only be cited as guides to discovering what has taken place in the Courts. The case has since been reported in 17 Ch. D. 480.

(1) 7 Ch. D. 411.

(2) 13 Ch. D. 160.

(3) Law Rep. 6 Ch. 594.

1881

BARTER
v.
DUBEUX.

8QBD455

given against him, or the judgment (which would not be against him personally) would almost only be in effect a judgment against the estate, that is to say, a declaration of a right of proof. Then that is a declaration which ought to be made not by the High Court, but by the Court of Bankruptcy, or by the county court judge. What, in truth, the plaintiffs are asking here is that they should be enabled to prove their debt in the High Court instead of in the Bankruptcy or county court, and I do not think they ought to be allowed to do so. Mr. McLeod says that they should be allowed to do this, for otherwise, he says, all the costs incurred will be wasted. That is a mere surmise, for if the Court of Bankruptcy should think some issue should be tried so that the question of fraud should be submitted to a jury, they would make a provision the effect of which would be that these costs would not be wasted. Allowing, however, that these costs may be wasted, it seems to me the plaintiffs have no right to make the trustee a party to the action, and that the proper Court for them to resort to in order to establish their case against the bankrupt's estate is the Court of Bankruptcy. I therefore think the appeal should be dismissed.

BRETT, L.J. I think the appeal should be dismissed, on the ground that the plaintiffs have failed to shew that it is necessary for the complete settlement of all questions involved in the action that the order or either branch of it should be made, namely, that the trustee should be joined as a defendant in the action, or that notice of the action should be served upon him. The action is brought upon a bill of exchange, and instead of a statement of claim the plaintiffs have referred to that which is endorsed upon the writ, and have asked for no other relief than for judgment for the amount which is due to them on the bill of exchange. The defendant pleaded and then became bankrupt. It is suggested first of all that the trustee should be made a defendant, but supposing he were, no judgment as it seems to me could be given against him. It must be taken that no judgment for any sum of money or for costs could be given against him personally. Then what judgment could be given against him? It is suggested a declaration could be made that the amount of the bill of exchange should be admitted in proof. It seems to me that in this action no such declaration could be made; it is not asked for, and it could only be made, if at all, after amending the statement of claim. But if such a declaration could be made, it seems to me it could be equally made in bankruptcy, and therefore the plaintiffs fail to shew, in either view, that it is necessary for the complete settlement of all the questions involved in the action that the trustee should be made a defendant. Then it is said nevertheless an order should be made that the trustee should be served with notice. What would be the value of that? It has been urged that the service of notice upon him would prevent him from reopening this case in bankruptcy. But I can see nothing in the rules under Order L. which say if the notice be given it would bind him. And therefore it seems to me the notice would have no effect at all. In either case the plaintiffs have failed to shew that it was necessary either that the trustee should be added as a defendant or that notice of the action should be served upon him. I therefore think the appeal should be dismissed.

COTTON, L.J. I think the order was rightly rescinded by the Divisional Court. The order was made, I presume, under rule 2 of Order L. Undoubtedly that rule applies to the case where a defendant becomes bankrupt, but the question is whether it applies to this case where a sole defendant has become bankrupt. Where there is an action against two defendants and one is a bankrupt, it being a claim against both, of course the one who does not become bankrupt cannot be made liable unless the action goes on. Then the rule applies, and the trustee may be made a party. The judgment is not against him or that he pay out of the estate, but judgment being against the other defendant, the plaintiff is at liberty to prove in the bankruptcy the amount of claim established, and there the trustee is a party, because it is necessary, both as against the bankrupt's estate and the other defendant, that the action should go on. Here there is a mere money claim against one defendant, and he has become bankrupt, and the only question in the action ought to be decided by the tribunal which is appointed by the legislature to deal with claims against a bankrupt's estate. It may be that there are circumstances which would induce the Court of Bankruptcy to say the case should be tried before a jury. If so, they may direct an issue or direct the action to be defended by the trustee. But that is no reason for allowing a trustee to be joined as a defendant. It is said we should interfere because otherwise some costs which have been incurred may be lost. But we cannot interfere because, as in hundreds of other cases, a plaintiff suffers a loss in consequence of the bankruptcy of a defendant. It would be wrong to the other creditors to let this action proceed solely on that ground. I am of opinion therefore that the order should not be made, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Roberts & Barlow.*
Solicitors for the trustee: *Gregory, Rowcliffes, & Co.*

W. P.

May 14.

DIXON *v.* THE METROPOLITAN BOARD OF WORKS.

Negligence—Liability of Metropolitan Board of Works for Damage caused by letting off Accumulation of Water from a Sewer—Metropolis Local Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 135, 136—*Act of God.*

The defendants, under the powers conferred upon them by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), ss. 135, 136, constructed, and properly constructed, a sewer having its outfall at Deptford Creek, a little above the plaintiff's coal wharf, with water-gates which it was the duty of the person in charge of them to open when the water within them became eight feet deep,—a depth which was reached only in heavy rainfalls. On the 29th of August, 1879, there was an exceptionally heavy rainfall, and it became necessary to open the water-gates to prevent a large district from being flooded. This having been done, and the rain increasing in violence, the rush of water from the sewer carried away a portion of the plaintiff's wharf, with a barge moored thereto and a quantity of coals deposited therein and thereon:—

Held, that the injury complained of was occasioned by the opening of the water-gates, and not by the act of God, and therefore the defendants were primâ facie liable for the damage done, within the principle of *Fletcher* v. *Rylands* (3 H. L. C. 330): but that, as they were a public body acting in the discharge of a public duty, and as that which happened was only the inevitable result of what Parliament had authorized them to do, they were not liable.

ACTION by the plaintiff, a coal merchant, to recover damages for injury to a barge, coals, &c., belonging to him, caused by the negligence of the defendants.

At the trial before Lord Coleridge, C.J., the case was reserved for further consideration.

1881. Jan. 14. *Philbrick, Q.C.*, *Willis, Q.C.*, and *Biron*, for the plaintiff.

F. M. White, Q.C., *Lumley Smith, Q.C.*, and *Finlay*, for the defendants.

Cur. adv. vult.

The facts and arguments sufficiently appear in the judgment.

May 14. LORD COLERIDGE, C.J. This case was tried before me and a special jury at considerable length; but the evidence was so fairly given on both sides that it appeared at last there was really no question of fact in dispute. The jury were therefore discharged, and the case was left to me to decide, after hearing argument upon the legal questions raised by the undisputed facts. Inferences of fact, if any were required, were to be drawn by me.

It was an action to recover compensation for damage undoubtedly done to the plaintiff's property,—a barge and coals, and a wharf and warehouses and buildings which stood by the side of Deptford Creek, and which were destroyed or very seriously injured by the rush of water from the outfall of a sewer of the defendants on the 29th of August, 1879. Speaking broadly, there is no doubt that any one would so describe what then happened. But, apart from a serious point of law, which goes to the root of the matter, and involves the question of the right to maintain the action, there are one or two lesser and subordinate questions of which it may be as well to dispose in the beginning.

The facts were shortly these:—This was a sewer constructed by the defendants under powers given them by 18 & 19 Vict. c. 120, ss. 135, 136. It drains a large area; and its outfall is at the head of Deptford Creek. There are water-gates, the construction of which it is not necessary to describe, which let the water out, and which it is the duty of the man in charge of the outfall to open when the water in the sewer just above these water-gates becomes eight feet deep. This is a depth not often reached; but it is reached in heavy rainfalls. There was a very heavy rainfall during the night and in the morning of the 29th of August; and the depth of water rose to eight feet and more in the sewer about a quarter to 10 o'clock in the morning of that day. Then one of the two water-gates was opened. The second was opened twenty minutes or half an hour later. The rain continued to fall, and it fell with increasing and excessive violence between 11 and 12 o'clock. The rush of water increased consequently in force and volume, and increased very rapidly; and somewhere about noon it drove the barges from their moorings one against the others. The effect of this was to dam up the water in one direction and to drive it with fierce force in another: and soon after noon, from the combined effects of what I have described, a large portion of the wharf and the coals and other things deposited upon it were swept away, and several of the barges were greatly injured.

No complaint was made of the construction of the sewer in itself, nor probably could there be: and it was admitted or proved that, if the water had not been let go from the sewer at the time it was let go, the damage to houses and property in Brixton, Stockwell, and Deptford itself would have been, in the language of one of the plaintiff's witnesses, "enormous." Indeed it was proved that, unless some such power existed of relieving the sewer in times of heavy rain, a system which drained from sixteen to twenty miles of area would be impossible or be frustrated.

Several points were made by the defendants upon the facts proved by the witnesses, on which so far as I have power I find and decide against them. It was contended that, inasmuch as the wharf did not fall till the water was directed upon it by the barges which the water itself had torn from their moorings and driven upon it, it was the barges and not the outfall which did the damage. I think not. The water poured in excessive torrents into the creek: it threw all things into confusion there; and, as the direct result of the confusion which it caused, it was itself driven with concentrated force upon the wharf and swept it away. This is, I think, the true effect of the evidence. The whole was one unbroken rush of water, and the barges apart from the water were no more the cause of the damage done than, supposing the water had torn away the gates and the gate-posts and hurled them against the wharf and so knocked it down, it could be said with any propriety that these instruments carried by the water, and not the water itself, had swept away the wharf.

Again, it was contended that, as the act for which the defendants were to be held responsible, if at all, was the act of opening the water-gates; as, once opened, they could not be shut till the tide rose against them; as they were open for near an hour before the damage followed; as during that hour the storm increased and increased rapidly in violence; and as what swept the wharf away was not the first rush of the water but the rush an hour later; it was not the act of the defendants but the act of God which in fact did the damage. On this point, however, so far as it is one of fact, I am against the defendants. On the assumption that the defendants may be liable in point of law, it seems to me that the rush of water was one, that no distinction can be drawn between one minute and another of a continuous rush which acted as it did not only from its strength but from its continuity, and that the gates being opened while a storm was raging the violence of which though unusual was proved to be by no means unprecedented; these things being facts in the case, I think the defendants cannot escape responsibility, if it lies on them in law, because in fact no harm was done at the very moment when they first set open gates, which once opened could not be closed for many hours, but was done by an unusual but not unprecedented body of water which it was not unreasonable under the then atmospheric conditions to anticipate might come down the sewer, and which if it did come down they were entirely without the means to arrest or control. Nor is this, as was suggested, an indirect way of attacking the construction of the sewer and its outfall-works. These may have been perfectly proper and sufficient; but one incident of them was, that, once set running, the flow of water could not be stayed; and the knowledge of this fact is in my opinion one circumstance at least to make the opening of such an outfall at such a time an act for which the defendants might be responsible.

I assent entirely to the view taken by Fry, J., and, as I understand, approved of by the Court of Appeal, in *Nitro-Phosphate Co.*

v. *St. Katharine Docks Co.* (1), as to what constitutes an act of God in the legal sense: and I am of opinion that what took place here *was* the natural and direct result of the act of the defendants in opening the water-gates when they did, and was not an act of God, so as to relieve them from liability, if otherwise they lay under it.

Then comes the question, are they liable in point of law under the circumstances I have described? This raises a different set of considerations. If the case of *Rylands* v. *Fletcher*, reported in the House of Lords in 3 H. L. C. 330, applies, then they are liable. The defendants have, in the words of Blackburn, J., afterwards adopted in the House of Lords, "brought upon their land, collected, and kept there something likely to do mischief if it escape." They must, therefore, keep it at their peril; and if they do not they are primâ facie answerable for all the damage which is the natural consequence of its escape. It was argued that the defendants were within the principle of *Nichols* v. *Marsland* (2), which is said to qualify or limit the principle of *Rylands* v. *Fletcher*. (3) I do not feel sure that I have mastered the distinction between these cases in *principle*, though the *facts* in them somewhat differed. To store water artificially, so that it escapes through fissures and does damage, is actionable: to store water artificially, so that when a thunderstorm comes the water overflows and does damage which but for the artificial storing it would not do, is not actionable. But it is not very material whether I understand the cases or no, because, first, the water was here discharged by the act of the defendants themselves, and even if the water-gates had burst or overflowed, the rain which fell was not within any reasonable definition of the words the act of God;

---

(1) 9 Ch. D. 515, 516. "I do not think that the mere fact that a phenomenon has appeared once, when it does not carry with it or import any probability of a recurrence—when, in other words, it does not imply any law from which its recurrence can be inferred—places that phenomenon out of the operation of the rule of law with regard to the act of God. In order that the phenomenon should fall within that rule, it is not in my opinion necessary that it should be unique, that it should happen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. That appears to me to be the view which has been taken in all the cases, and notably by Lord Justice Mellish in the recent case of *Nichols* v. *Marsland*, 2 Ex. D. 5."

(2) Law Rep. 10 Ex. 255; 2 Ex. D. 5.

(3) Law Rep. 3 H. L. 330.

and, secondly, as this case will probably go to the Court of Appeal, that Court will no doubt understand the distinction between those cases, and will be able to say at once by which authority the case before me is to be governed. I therefore hold this case to be primâ facie within the decision of the House of Lords in *Rylands* v. *Fletcher* (1), and that the defendants are primâ facie liable.

But it was said that they are to be excused from this primâ facie liability because they are a public body acting in the discharge of a public duty, and that what has happened is only the inevitable result of what Parliament has authorized them to do. Not entirely without hesitation I am of that opinion. My doubts arise from a few words in the 135th section of 18 & 19 Vict. c. 120, to which I will advert in a moment. But for those words I should hold without doubt that what the defendants have done falls within the authority of *Vaughan* v. *Taff Vale Ry. Co.* (2), *Dunn* v. *Birmingham Canal Co.* (3), *Brand* v. *Hammersmith Ry. Co.* (4), and a case of *Broughton* v. *Midland Great Western Ry. Co.* (5), decided in the Common Pleas in Ireland by Monahan, C.J., and Morris and Lawson, JJ., in which though the Chief Justice expressed doubts, they were doubts on a point of fact only, and not at all on the principle of the decision. To these must be added the dicta to be found in the judgments in the House of Lords of the Lord Chancellor Selborne, and Lords Blackburn and Watson, in the case of *Metropolitan Asylum District* v. *Hill* (6), concerning the Hampstead Smallpox Hospital. In that case the noble and learned lords expressly uphold the authority of the cases to which I have referred, though in the particular case before them they held the defendants liable (although a public body), because they thought, upon the words of the statute they were construing, no absolute duty to maintain such a hospital in such a place was cast upon the defendants.

In the case before me, I think that the duty of making, and maintaining when made, the sewer in question was absolutely imposed upon the defendants by the 135th section (no question arose as to the 136th); and, if so, the cases I have referred to are in point, and the defendants would be protected. The duty being imposed upon them of making the sewer, it followed necessarily that from time to time a very large body of water would be discharged from the outfall of the sewer into the head of Deptford Creek; and if this were not done a large and densely populated area would be heavily and injuriously flooded.

---

(1) Law Rep. 3 H. L. 330.

(2) 5 H. & N. 679. 4 Ju. N.S. 1302.

(3) Law Rep. 7 Q. B. 244; Law Rep. 8 Q. B. 42.

(4) Law Rep. 1 Q. B. 130; Ibid. 2 Q. B. 223; Ibid. 4 H. L. 171.

(5) 1 Ir. C. L. Rep. 169.

(6) 6 App. Cas. 193.

My doubt arises from the words of the 135th section, that the "sewers are to be constructed, covered, and kept so as not to be a nuisance nor injurious to health." I think, having regard to the latter part of the same clause, where the same words are used with reference to sewage and refuse, that it is probable this provision has no reference to a case of damage arising from flood, to which indeed it can be applied only by some straining of the language. See upon this subject the case of *Great Western Ry. Co.* v. *Bishop* (1), decided upon the words of the 8th section of the Nuisances Removal Act, 1855. (2)

But, if the question of nuisance be one of fact, and therefore in this case for me to find, I find without hesitation that there was no evidence that this sewer had been constructed, covered, or kept so as to be a nuisance or injurious to health.

The amount of damage, if any, was to be referred; but my opinion being what it is no question of damage arises, and I give judgment for the defendants. I give this judgment without costs, as I do not think it is a case in which the plaintiff should pay them.

Judgment for the defendants.

Solicitor for plaintiff: *John Thomas Moss.*
Solicitor for defendants: *Reginald Ward.*

J. S.

(1) Law Rep. 7 Q. B. 550.

(2) 18 & 19 Vict. c. 121.

DAVIES *v.* WISE; CRAMER & Co., CLAIMANTS.
CRAMER & CO., APPELLANTS; MATTHEWS, RESPONDENT.

1881
May 26.

County Court—Interpleader—Practice—Deposit—Request—Sale by High Bailiff —19 & 20 *Vict. c.* 108, *s.* 72—30 & 31 *Vict. c.* 142, *s.* 31—*County Court Order XXI., rule* 1.

Under Order XXI., rule 1, of the County Courts Orders and Rules, 1875, it is not necessary for the high bailiff, before selling goods seized in execution and claimed, to request the claimant to deposit the amount of the value of the goods or possession money, and, if no such deposit be made, the high bailiff is entitled under 19 & 20 Vict. c. 108 (the County Courts Act, 1856), s. 72 to sell the goods without first applying for an interpleader summons under 30 & 31 Vict. c. 142 (the County Courts Act, 1867), s. 31.

APPEAL by special case from the county court holden at Chester.

The plaintiff, having recovered judgment in the county court for 10*l.* 2*s.* 6*d.* against the defendant, issued execution under which the high bailiff, on the 8th of September, seized, inter alia, a pianoforte hired by the defendant of the claimants. On the 11th of September the landlord of the premises, on which the piano was, distrained it for 13*l.* rent. No formal notice under 19 & 20 Vict. c. 108, s. 75, was delivered by the landlord to the high bailiff or his officer, but the distress warrant was shewn to the officer, and the high bailiff gave to the landlord an undertaking to pay the 13*l.* rent out of the first proceeds of the sale, and afterwards paid it, and the landlord withdrew. On the 11th of September the claimants first became aware of the seizure of the piano, and sent their manager, who gave verbal notice to the high bailiff that the piano was their property, and on the same day sent notice in writing to the same effect, and that any goods of the defendant must be sold first to cover rent owing. The high bailiff replied that he intended selling everything seized before he sold the piano, and that he would give up possession of it to the claimants on payment of the balance required, which would be from 11*l.* to 13*l.* On the 23rd of September sale was made. After the other goods had been sold the county court bailiff told the claimants' representative that 10*l.* was required to make up the amount, and that if that sum were paid or security given for it by the claimants the piano should not be sold. The claimants declined to pay or give any security. The bailiff did not ask them to deposit the cost of keeping possession of it or its value. The piano was then sold and realized 17*l.* 10*s.*, which was afterwards paid into court, but there was no evidence to shew when it was so paid. On the 1st of October an interpleader summons was issued at the instance of the high bailiff, summoning the claimants to appear on the 14th of October to support their claim to the goods, and stating that, in default of their establishing it, the goods would be sold. The claimants delivered particulars claiming the piano, and subsequently by leave of the judge, amended their particulars by adding a claim against the high bailiff for damages, 24*l.* 10*s.*, being the difference between the price alleged to have been realized by the sale of the piano and the value of the same, and the claimants claimed such damages on the ground that he improperly and illegally sold such piano after its seizure and after notice of their claim to the same.

On the 4th of November the summons was heard, and it was proved that the value of the piano was 35*l.* The county court judge was of opinion that the bailiff was justified under the circumstances proved in the case in continuing the sale, and only entered judgment for the claimants for the amount realized by the sale and in court, with costs.

The question for the opinion of the Court was, Whether upon the facts above stated the county court judge ought not to have given to the claimants damages as against the high bailiff to the extent of the difference between the amount in court and the value of the piano?

R. H. Collins, for the claimants. First, the sale by the high bailiff at the time he made it was wrongful. 19 & 20 Vict. c. 108, s. 72 (the County Courts Act, 1856), enacts that where any claim shall be made under s. 118 of 9 & 10 Vict. c. 95, to goods taken in execution, the claimant may deposit with the bailiff either the value or possession-money and in default the bailiff may sell. Sect. 118 is repealed and s. 31 of 30 & 31 Vict. c. 142 (the

County Courts Act, 1867), substituted, which provides that if any claim to such goods or the proceeds shall be made it shall be lawful for the registrar upon application of the high bailiff to issue an interpleader summons. This provision must be read into s. 72, and the result is that if the high bailiff takes no interpleader proceedings, but sells the goods, he acts at his own risk of being right as to the ownership. It rests with him to decide whether proceedings under s. 31 are taken or not. If he does not choose to take them, s. 72 does not apply. The claimants could not get the interpleader summons and there was no obligation on them to pay money into court, and so no default by them and no obligation on the high bailiff to sell the goods. But assuming even that there was, it is for the high bailiff to request the claimants to make a deposit. By the County Court Orders and Rules, 1875, Order XXI. r. 1, where any claim is made to goods taken in execution or to their value, and summonses have been issued on the application of the high bailiff, such summonses shall be served as thereinbefore directed, "provided that where the claimant has not at the request of the bailiff made deposit in accordance with s. 72 of the County Courts Act, 1856, the time of service may, if the high bailiff so desires, by leave of the judge or registrar, be such time as will obtain a speedy decision on the claim." The high bailiff made no request for a deposit. "Claim" in s. 72, means a claim met by a summons taken out by the high bailiff, and until such summons the remainder of s. 72, enabling him to sell does not operate. He was a wrongdoer in selling before interpleader proceedings, and the county court judge should have given judgment against him for the damages claimed.

Secondly, the landlord claimed rent, and the high bailiff paid it out of the proceeds, but the landlord had not complied with the requirements of 19 & 20 Vict. c. 108, s. 75, and his claim should have been disregarded, and then it would have been unnecessary to sell the piano.

H. Tindal Atkinson, for the high bailiff, was requested to confine his argument to the first point.

Interpleader in the county court differs from the proceeding in a superior Court, because there can be no hearing of a summons until the county court judge comes round to the place in his circuit. The procedure of a summons is not a condition precedent to the sale. If it were so the high bailiff must delay any sale until the next Court day. He is, however, bound to do his duty and s. 72 is imperative. If a deposit is made, he must take out an interpleader summons, if no deposit is made he must sell. Sect. 72 puts him in the position of a sheriff who gets an intermediate order, which the high bailiff cannot get. The claimants stood by and saw the sale. It was in the discretion of the county court judge to decide whether any damages had been suffered by the claimants.

Cur. adv. vult.

May 26. HUDDLESTON, B. The claimants based their right to damages on the ground that the high bailiff illegally sold, and they contended that he ought not to have sold before a summons had been taken out under the interpleader clause, or, at all events, that he ought not to have sold until he had requested the claimants to pay a sum of money, or to deposit either the value of the piano, or the amount the high bailiff would be entitled to for keeping possession of the piano until the dispute was decided. The question, therefore, is whether it is necessary in interpleader proceedings in the county court, that a "request" should be made by the high bailiff to deposit the amount of the goods before he can sell them, and whether he can sell the goods before he has taken out his summons under the interpleader clauses of the County Courts Act? We think that the county court judge was right, and that a claimant is in this position: If he wishes to prevent the goods being sold by the high bailiff, the claimant must take the first step and make a deposit, and it is unnecessary that there should be any request by the high bailiff.

30 & 31 Vict. c. 142, by sect. 31 which is substituted for the repealed s. 118 of 9 & 10 Vict. c. 95, provides for interpleader, and I think it clear that the object of s. 31 is the protection of the high bailiff when two conflicting claims are made before him, and to relieve him from the difficulty in which they place him, and at the same time to do complete justice between the parties. The high bailiff receives the warrant of execution and must execute it. He has to execute it on goods of the execution

debtor, and in the interest of the execution creditor. The high bailiff having taken goods apparently belonging to the execution debtor, a third person claims them. There are then two conflicting claims, viz., that of the execution creditor, and that of the claimant.

The law, treating the high bailiff as a kind of stakeholder, enables him to relieve himself from his position thus: instead of applying to the county court judge who is ambulatory, the high bailiff may apply to the registrar, a stationary official, and on the application of the high bailiff the registrar shall issue a summons, as prescribed in s. 31, the effect of which is, in substance, that the summons being issued the claimant is to come in and support his claim, and then the county court judge, having the whole matter before him, decides all the questions between the parties; if the claimant is entitled to have the goods, he gets them, if they are sold the county court judge will ascertain what the value is, and if the claimant has a claim against the high bailiff, the county court judge may award damages on it, and any cause of action may thus be satisfied. That is a section for the relief of the high bailiff from the position in which he is placed by conflicting claims. Sect. 72, of 19 & 20 Vict. c. 108, the County Courts Act, 1856, provides for cases where the high bailiff may sell, and the words of it are clear and explicit: "Where any claim shall be made under s. 118"—Mr. Collins said that the claim can only be when a summons is issued. I do not think so. The claim is a claim by the party, and if the high bailiff chooses to deal with it in that way, he may apply for a summons, and the claimant cannot issue an interpleader summons. "The claimant may deposit with the bailiff either the amount of the value of the goods claimed"—the learned counsel for the claimant says that it is hard on the claimant, and asks how is he to know the value of the goods claimed? But if he does not, who does?—"such value to be fixed by appraisement in case of dispute."—The sum is not to be kept in the hands of the bailiff, but is "to be by such bailiff paid into court to abide the decision of the judge upon such claim, or" the claimant may deposit "the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods until such decision can be obtained." If the claimant does not choose to deposit the amount of the value of the goods, he must pay into court possession-money. The claimant must pay in a sufficient sum; he knows when the seizure was, and when the county court judge will come, and he must multiply the amount of possession-money for a day by the number of days to elapse before the arrival of the judge. "And in default of the claimant so doing, the bailiff shall sell such goods as if no such claim had been made, and shall pay into court the proceeds of such sale, to abide the decision of the judge." So the high bailiff is to sell unless the claimant does those things, and it is only in default of them that the high bailiff may sell. Who then is to take the first step? The claimant. The whole difficulty has been raised by the words "at the request" of the bailiff, which are unadvisedly used in Order XXI., r. 1, of the County Court Orders and Rules, 1875. That rule refers to service of interpleader summonses, and it is "provided that where the claimant has not at the request of the bailiff made deposit in accordance with s. 72 of the County Courts Act, 1856, the time of service may, if the high bailiff so desires, by leave of the judge, or registrar, be such time as will obtain a speedy decision on the claim." But there is no provision for such a request in s. 72. The words, "at the request," have been introduced into the rule without reflection, or due consideration of the Act.

I think the high bailiff was justified in selling the piano, and that the objection that a request should have been made by the bailiff to the claimants and that a summons should have issued before the goods were sold, fails. The appeal must be dismissed with costs.

HAWKINS, J. I am of the same opinion. Sect. 72 of the County Courts Act, 1856, prescribes the mode in which a claimant, who alleges that his goods have been improperly seized, may interfere to prevent the sale of them. In a few words the meaning of that section is that if goods are seized under county court process against any one, and are claimed by another person, he may prevent a sale if he chooses to deposit with the high bailiff the value of the goods themselves, or to hand over to him such a sum as will enable him to keep possession of the goods until the title to them is determined; and the proviso of Order XXI., r. 1, is really intended to expedite the procedure where the claimant has not made deposit in accordance with s. 72; and it not only gives the county court judge power, but seems to enforce on him the necessity, of making such appointments for the case as to enable the parties to get a speedy decision. What was done here? The goods were seized under process. The claimants knew the goods had been seized, because they sent their agent over to claim them. He did claim them verbally, and I am not aware that any written claim is necessary. He was told that he might have possession on payment of the balance required, which would be from 11*l.* to 13*l.* He knew the goods were advertized for sale. He took no notice of s. 72, and did not tender the value of the goods, nor the 13*l.*, nor did he offer to pay any sum of possession-money. He did not fulfil the requirement of this section, which would impose on the high bailiff a duty not to sell until after the decision of the county court judge, and therefore, under the provisions of s. 72, the bailiff was enjoined to sell as if no such claim had been made, and to pay the proceeds into court. Having sold, he did so, I think, under the authority of the Act, and paid the money into court under the authority of the Act. That, however, would not have prevented the claimants bringing an action against him for illegal seizure or sale. But if that action had been brought the high bailiff would have been entitled to stay it on taking proceedings under s. 31. The high bailiff, if he chooses to put that section into operation, may, whether a deposit has been made, or action brought, or not, take out an interpleader summons, and at the hearing before the county court judge the judge is finally to determine the matter between the parties not only as to the property in the goods, but all questions arising out of the execution: *Death* v. *Harrison* (1); that case was followed in *Hills* v. *Renny* (2), where the same point was established, and also in other cases.

What then are the objections raised in support of the contention that the claimants are entitled to have the damages increased, and to shew that the county court judge was wrong? One point, not much pressed and almost disposed of in the course of argument, was made by Mr. Collins saying that there was no necessity to sell the piano at all, because sufficient goods of Wise were sold to satisfy the levy at the suit of Davies, and it was only necessary to sell the piano to satisfy the execution plus the 13*l.* rent. It was said the high bailiff had no right to levy that amount, because the formal notice prescribed by statute was not given by the landlord. True, such notice was not given, but the warrant of distress was shewn to the county court bailiff, and he gave his undertaking that if the landlord retired he (the county court bailiff) would hand over the amount of rent, which the landlord was clearly in a position to recover by distress. I think the formal notice required by statute was only intended to compel the high bailiff to take care that the amount of the landlord's claim is provided for out of the levy, and does not affect the case as between a claimant and the high bailiff. Then it is said that assuming the county court judge has jurisdiction finally to determine all these matters between the claimant and the high bailiff, his duty was to give the claimant the full value of the property illegally seized, and that full value was 35*l.* But I think he was perfectly justified in the course he took. The sale was under the authority of s. 72. The claimants knew quite well, or must be supposed to have known, that, if they thought fit, they might have saved their goods by tendering the value or possession-money. The proceedings are analogous to those under sheriff's process. An authority nearly in point is *Abbott* v. *Richards* (1), in which Pollock, C.B., said, "I find no suggestion in the affidavits of any special damage; and the supposed hardship on the party of having his goods seized and sold, perhaps for less than their value, and receiving only the proceeds of the sale, is a matter which might and ought to be brought before the judge at the time of the making of the order. Here nothing of that nature appears to have been stated to him. There may perhaps be some doubt as to the extent of the judge's authority under the Act; my impression

---

(1) Law Rep. 6 Ex. 15.

(2) 5 Ex. D. 313.

---

(1) 15 M. & W. 194–6.

1881

CRAMER v. MATTHEWS.

Hawkins, J.

is that he has a right to do all that is just, proper, and equitable under the circumstances. Here we must presume that he did so. It would, therefore, be very unjust to make the sheriff responsible for what he did under the order of the judge." That last sentence may be applied to the high bailiff on this occasion. He sold under order of an Act of Parliament, so, à fortiori, he ought to be protected. I think the learned county court judge has taken the whole of the circumstances into consideration, and that if he has power to exercise a discretion in the matter he has well exercised it. It may be that he was compelled to give judgment, on the authority of the decided cases, for what the goods realized. But he might very well say to the claimants, "If you place your piano in the hands of a man and allow him to get into arrear with his instalments, and when you know that it is seized in execution you do not choose to pay a deposit, I will not assist you by giving you any special damage." With respect to the last words of s. 72, as to the costs of keeping possession, they may have been inserted in consequence of observations made by the judges in *Carpenter* v. *Pearce.* (1)

Appeal dismissed with costs.

Solicitor for claimant: *Field.*
Solicitors for high bailiff: *Reep, Lane, & Co.*

(1) 27 L. J. (Ex.) 143.

J. R.

1881
June 22.

[IN THE COURT OF APPEAL.]

BREE *v.* MARESCAUX.

Practice—Service of Writ out of Jurisdiction—Slander uttered Abroad—Special Damage within Jurisdiction—"Act done"—Order II., rule 4—*Order XI., rule* 1.

On an application for leave to issue a writ of summons for service out of the jurisdiction, it appeared that the cause of action was an alleged slander uttered abroad and followed by special damage in England:—

Held, by Denman and Watkin Williams, JJ., that the special damage in England was not an act done within the jurisdiction, so as to give the Court power to allow service of the writ out of the jurisdiction under Order XI., rule 1:

Held, by the Court of Appeal (Bramwell, Brett, and Cotton, L.JJ.), that the writ ought not to issue, for as it was not shewn that the slander was intended to be transmitted to England the special damage, if it was the cause of action, was not the act of the person who uttered the slander, or an act for which he was responsible, so that there was no act done by him within the jurisdiction within Order XI., rule 1.

Appeal from an order of a judge at chambers refusing leave to issue a writ against Marescaux, a British subject, resident at Kingston, Jamaica, for service there out of the jurisdiction. The application was made under Order II., rule 4, which directs that "no writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of the Court or judge," and Order XI., rule 1, which enables a Court or judge to allow service out of the jurisdiction, whenever inter alia "any act or thing for which damages are sought to be recovered was done within the jurisdiction."

The affidavit in support of the application disclosed the following facts. The applicant, Bree, was third officer on board the Royal Mail Steam Packet Company's vessel *Para*, and the proposed defendant Marescaux, was a passenger on that vessel on a voyage from England to Jamaica. During the voyage Marescaux made a complaint to the captain of the vessel charging Bree with misconduct towards one of the lady passengers. On the arrival of the ship at Kingston, Jamaica, the marine superintendent of the company communicated to Bree the charge made against him (the truth of which Bree denied), and informed him that the matter would be reported to the company at their London office. The matter was accordingly reported to the directors of the company at the chief office in Moorgate Street, London. In consequence of this report, on the return of the vessel to Southampton, Bree was dismissed from the service of the company. The affidavit stated that the slander complained of was spoken and published by the defendant to the captain of the ship as the agent of the company, and was intended to be transmitted, and was transmitted to the company in London. Bree was desirous of bringing an action for this slander against Marescaux, and applied for leave to issue a writ for service out of the jurisdiction, which was refused.

June 15. *E. F. Silvester,* in support of the appeal. The cause of action here is the uttering of the slander, followed by special damage. The special damage, which forms part of the cause of action, is the dismissal of the plaintiff from his employment, and that took place in England; that therefore is the "act done" within Order XI., rule 1, which gives the Court power to order the writ to be served out of the jurisdiction. The cause of action was not complete till the slander came to the ears of the directors in England and was followed by the dismissal of the plaintiff. The marine superintendent and the captain were only the conduit pipe to this country, and the defendant is responsible for the report being sent here. The case resembles that of a letter sent from one place to another, as in *Evans* v. *Nicholson* (1), which being intended to act on the mind of the recipient does so when he receives it, and so gives jurisdiction at the place where it is received: see the remarks of Field, J., on *Evans* v. *Nicholson* (1) in *Reg.* v. *Rogers.* (2)

DENMAN, J. I think, and I must say with some regret, that we ought not to interfere with the refusal of the judge at chambers to grant this application. The question turns on whether there was an act done within the jurisdiction within the meaning of Order XI., rule 1. The action which it is sought to bring is for slanderous words uttered out of the jurisdiction resulting in special damage, without which they would not be actionable, and this special damage occurred in England. It appears to me that the fact of the special damage occurring in England does not bring the case within the words of the rule. The "act done," which is the basis of the action, was the uttering of the words out of the jurisdiction. It is true that something occurred afterwards within the jurisdiction which made the cause of action complete, but it was not the act of Marescaux. This construction may seem a technical one, but it appears to me to be the one that we ought to put upon the words of the order. If so, the case is not brought within those words, and this application must fail.

---

(1) 32 L. T. (N.S.) 778, cited in *Taylor* v. *Jones,* 1 C. P. D. 87.

(2) 3 Q. B. D. at p. 34.

WATKIN WILLIAMS, J. I am of the same opinion; though at first the inclination of my mind was the other way. The defendant by his complaint aimed a blow at the character of the plaintiff, and the injury followed at Southampton, where he was dismissed. The case might seem to be analogous to that of a wound inflicted by a shot fired from without the jurisdiction, but on the whole I think this analogy does not apply, and that the case is not brought within the words of the rule.

The applicant appealed.

Appeal dismissed.

A. M.

June 22. *E. F. Silvester* supported the appeal. The case is within Order XI., rule 1. In *Great Australian Gold Mining Company* v. *Martin* (1), James, L.J., said that he thought there should be an affidavit that the defendant made "a misrepresentation with regard to the matters in question, and that that misrepresentation has been used in England, and that in consequence of such misrepresentation being used in England the company have been put to considerable expense." Here the slander was used in England.

[BRAMWELL, L.J. There was a case in which Maule, J., ruled that where the words were not actionable in themselves, but defamatory and followed by special damage, that was the cause of action.(1) A person is injured by the loss of a situation, caused by somebody slandering or defaming him.]

---

(1) 5 Ch. D. 1.

Here the special damage, the loss of situation, was in England: *Rex* v. *Burdett* (2) shews that if the slander complained of had been conveyed in a letter written by Marescaux which had been forwarded as he intended it should be to London, the act of publication would be taken to be in London. Here the words complained of were spoken with the intent that they should reach the directors in London.

Bramwell, L.J. I am of opinion that this application must be refused. If the act complained of be the speaking of the alleged slanderous words then that was not done within the jurisdiction. If, however, as ruled by Maule, J., in the case to which I have referred, which I am unable to find but which I distinctly remember, having been counsel for the plaintiff, and made the point which he ruled in the plaintiff's favour, the cause of action is the damage occasioned by uttering the words, then there is ample authority to shew that a man is not liable for damage occasioned by a repetition of the slander; that is to say, if A. said to B. that C. stole his sheep, though A. would be liable to C. for such slander, yet if B. repeat this slander, A., the original speaker, would not be responsible for this. Therefore, if the damage done in England be the cause of action, I do not think that Marescaux, the intended defendant, caused such damage, for although the affidavit says that the slander complained "was intended to be transmitted, and was transmitted to the company in London," I have no doubt that Marescaux did not say it should be sent to England, but that he made the charge to Captain Parkes and said that he might do with it what he pleased. It seems to me then that in either view, whether the speaking of the words or whether the damage done be the act complained of, this application must fail. If necessary for me to distinguish this case from that of *Great Australian Gold Mining Company* v. *Martin* (3) I think it is obviously distinguishable, for that case stood over for the plaintiffs to file a further affidavit, and there was ultimately an affidavit made, "that the defendant, Sir J. Martin, in collusion with the other defendants, and for the purpose of procuring a company to be formed in England, and in consideration of money and shares to be obtained by him from the company when formed, made in England certain false and fraudulent misrepresentations as to the value and nature of a certain mine." Therefore there was an act done there by the defendant within the jurisdiction.

---

(1) Diligent search has been made for this case, but it has not been found.—Rep.

(2) 4 B. & A. 95.

(3) 5 Ch. D. 1.

BRETT and COTTON, L.JJ., concurred.

Appeal dismissed.

Solicitors for applicant: *Alderson & Fenwick.*

W. P.

June 26.

[IN THE COURT OF APPEAL.]

JOHNSON AND ANOTHER v. RAYLTON, DIXON, & CO.

Sale—Sale of Goods by a Manufacturer—Implied Contract that Goods are of Manufacturer's make—Evidence—Custom.

On the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, there is, in the absence of any usage in the particular trade or as regards the particular goods to supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make.

The plaintiffs, who were manufacturers but not dealers in iron, by a written contract, on the margin of which was their trade-mark (a crown with their initials), contracted to sell to the defendants, who thereby contracted to buy of the plaintiffs, 2000 tons of ship-plates of the quality known as "Crown," to pass Lloyd's survey to be delivered monthly at the defendants' shipyard. The contract contained a strike clause by which the supply of the iron contracted for might be suspended during the continuance of any strike of workmen; but it had no express stipulation that the plates should be of the plaintiffs' manufacture. Before the contract was completed the plaintiffs closed their works, and proposed to complete the contract by delivery of ship-plates of the quality mentioned in the contract made by another firm. The defendants having refused to accept these, the plaintiffs sued them for breach of contract.

At the trial the defendants tendered evidence to show that in the iron trade there is a custom that, under a contract between a manufacturer of iron plates and a customer for the supply of them, the seller must, in the absence of stipulation to the contrary, supply plates of his own make, and that the purchaser is entitled to

1881

JOHNSON
v.
RAYLTON.

reject other plates if tendered though of the quality contracted for. The learned judge at the trial rejected this evidence, and gave judgment for the plaintiffs:—

Held, that such evidence was improperly rejected.

Held, also, by Brett and Cotton, L.JJ. (Bramwell, L.J., dissenting), that without such evidence the defendants were entitled to succeed, as the contract implied that the plates to be supplied should be of the manufacture of the plaintiffs, and that therefore the plaintiffs could not require the defendants to accept plates not of their own manufacure, even though of the quality contracted for and as good as those made by the plaintiffs themselves.

The plaintiffs, who were iron manufacturers and carried on business as such at the Moor Iron Works, Stockton-on-Tees, in the county of Durham, but did not otherwise deal in iron, sued the defendants who were shipbuilders at Middlesborough in the county of York, for breach of a contract to buy and accept from the plaintiffs 2000 tons of iron ship-plates, to be of the quality known as "Crown," to pass Lloyd's survey, at the price per ton of 6*l.* 2*s.*, and to be delivered at the defendants' shipyard at Middlesborough over the first nine months of the year 1879, in about equal monthly quantities. The contract was dated the 13th of December, 1878, and was contained in a printed form supplied by the plaintiffs, which was afterwards filled up and signed. It was headed "The Moor Ironworks, Stockton-on-Tees," and had on its margin the printed brand or trade-mark of the plaintiffs, being a crown with the initials "J. & R." over it, and the word "Moor" under it. It contained all the terms of the contract as to quantity, quality, price per ton, rate of delivery, and place of delivery, but no express stipulation that the plates should be of the plaintiffs' manufacture. At the foot of the contract was a strike clause as follows: "In the case of strikes or combination of workmen, or accidents causing a stoppage of the works, the supplies of iron now contracted for may be suspended during their continuance. This clause applies to buyers and sellers."

As the size and shape of the vessel determine the size and shape of the plates, the shipbuilder has to send from time to time to the iron manufacturer who has contracted to supply the plates, specifications of the sizes and shapes required, so that they may be manufactured accordingly, since iron plates are not kept in stock fit for all ships. In the present case some specifications were sent and deliveries made under the contract, but before it was completed the plaintiffs closed their works and proposed to complete the contract by iron plates manufactured by other firms of the quality mentioned in the contract. The defendants refused to accept these and to furnish the specifications required for making them.

At the trial before Manisty, J., at the last Spring York Assizes, it was admitted that the iron plates which the plaintiffs proposed to deliver would be of Crown quality to satisfy a Lloyd's survey and substantially as good as if manufactured by the plaintiffs, but the defendants insisted that they had a right to have plates manufactured by the plaintiffs themselves, and they tendered evidence to shew that in the iron trade there is a custom that, under a contract between a manufacturer of iron plates and a customer for the supply of plates, the seller must in the absence of stipulation to the contrary supply plates of his own make, and that the purchaser is entitled to reject other plates if tendered though of the quality contracted for. This was objected to as contradicting the terms of the written contract, and the learned judge refused to admit such evidence, and being of opinion that the contract did not import that the iron plates should be of the plaintiffs' own manufacture, he gave judgment for the plaintiffs for such sum as should afterwards be determined by a referee.

The defendants appealed.

April 27, 28. *Benjamin, Q.C.*, and *H. Shield, Q.C.*, for the defendants. Upon the true construction of the contract the defendants were entitled to call upon the plaintiffs to supply iron plates of their own manufacture. Two cases have been decided in the Scottish Courts, which may seem to support the argument for the plaintiffs: *West Stockton Iron Co.* v. *Nielson & Maxwell* (1) and *Johnson & Reay* v. *Nicoll & Son* (2); but in the former case the judges were not unanimous.

[BRETT, L.J. The argument for the defendants really comes to this, that if goods are ordered of a manufacturer he is bound to make them.]

The express stipulation, that the iron plates were to pass

---

(1) 17 Scottish Law Rep. 719; 7 Court Sess. Cas. 4th Series, p. 1055.

(2) 18 Scottish Law Rep. 268; 8 Court Sess. Cas. 4th Series, p. 437.

Lloyd's survey, does not exclude the implied term that they should be of the plaintiffs' own manufacture: *Bigge* v. *Parkinson.* (1) There is a great difference between ordering iron plates from a manufacturer and from a merchant, in the former case the intending buyer necessarily trusts to the judgment or skill of the manufacturer: *Jones* v. *Just.* (2)

The evidence as to the custom was wrongly rejected: in mercantile contracts evidence of custom can always be received, upon the principle that the parties to them must be supposed to contract with reference to known usages: *Hutton* v. *Warren* (3); *Wigglesworth* v. *Dallison* (4); *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.* (5) In the present case the contract must be read as if the words "manufactured by us" (the plaintiffs) had been actually inserted.

[BRAMWELL, L.J. In *Brown* v. *Byrne* (6), the words of a bill of lading were held to be controlled by a custom which was proved to exist.]

D. Seymour, Q.C., and *Forbes, Q.C.* (*Cohen, Q.C.*, with them), for the plaintiffs. There is no reason why a manufacturer may not sell as a merchant. In the present case it was no part of the written contract that the iron plates contracted for should be of the plaintiffs' own manufacture, and it cannot be implied that they should be so, merely because the contract is on a printed form in which the place of the plaintiffs' manufactory is described, and their trade-mark printed in the margin. Why should it be implied that it was part of the contract that the ship-plates should be manufactured by the plaintiffs? It is not suggested that the plaintiffs' Crown plates had any known speciality in the trade, and so long as the plates were of the quality contracted for it was immaterial to the defendants for the purposes for which they required them of whose manufacture they were. The contract was a contract to sell and not to manufacture or get manufactured the specified article. The Scotch cases of *West Stockton Iron Co.* v. *Nielson & Maxwell* (7) and *Johnson & Reay* v. *Nicoll &*

---

(1) 7 H. & N. 955. 8 Jur NS 1014
(2) Law Rep. 3 Q. B. 197, at p. 203.
(3) 1 M. & W. 466, at p. 475.
(4) 1 Sm. L. C. 7th ed. p. 598.
(5) 5 Ch. D. 205, at p. 215.
(6) 3 E. & B. 703.
(7) 17 Sottish Law Rep. 719; 7 Court Sess. Cas. 4th Series, p. 1055.

Son (1) are precisely in point, and in favour of the plaintiffs' construction of the contract. The contract, which was the subject-matter of the last of these two cases, is identically the same as the contract in this action, and it was there held that the plaintiffs might supply iron plates made by another firm in fulfilment of the contract. In *Cort* v. *Ambergate Ry. Co.* (2) the plaintiff, a manufacturer, who had contracted to supply a railway company with a quantity of railway chairs, in suing for a breach of such contract, was allowed to claim as part of his damages the money he had paid to a sub-contractor who had contracted to furnish the plaintiff with part of the goods.

[BRETT, L.J. This point did not arise there. There was nothing to shew that Cort was a manufacturer, and the decision was only that, if the railway company would not take the chairs, the plaintiff was not bound to get them from a sub-contractor.]

There was nothing in the manufacture of the ship-plates which required the personal skill or superintendence of the plaintiffs. If they had become bankrupt, could not the trustee in bankruptcy have completed the contract and claimed the price? *British Waggon Co.* v. *Lea & Co.* (3); *Boulton* v. *Jones.* (4) Per Parke, B., in *Gibson* v. *Carruthers* (5); Leake on Contracts, p. 1272. The strike clause at the end of the contract is in favour of the plaintiffs' construction of the contract, as in case of strikes it makes it optional on them to perform the contract, and which could only then be done by supplying iron of other manufacturers. Next, the learned judge rightly excluded the evidence of custom which the defendants tendered at the trial. The contract was in writing, and if its effect was altered by the custom, and not as stated in the claim, the defendants, if they intended to rely on this, should have specially stated it in their pleadings, as otherwise the plaintiffs would be taken by surprise: Order XIX., rule 18. Further, the evidence was inadmissible, as it contradicted the written contract, or, at least, as the defendants admit, added a new term, viz., "manufactured by us": Benjamin on Sale, p. 156;

---

(1) 18 Scottish Law Rep. 268; 8 Court Sess. Cas. 4th Series, p. 437.

(2) 17 Q. B. 127; 20 L. J. (Q.B.) 460.

(3) 5 Q. B. D. 149.

(4) 2 H. & N. 564.

(5) 8 M. & W. 333.

Chitty on Contracts, by Russell, 10th ed. p. 414; *Humfrey* v. *Dale* (1); *Fleet* v. *Murton* (2); *Hutchinson* v. *Tatham.* (3)

Benjamin, Q.C., in reply.

Cur. adv. vult.

June 26. COTTON, L.J. The plaintiffs in this case are not dealers in iron but manufacturers, and they are so described in the statement of claim and in the contract on which they sue. By the contract the defendants agreed to buy from the plaintiffs 2000 tons of ship-plates of the quality known as "Crown," to pass Lloyd's survey, to be delivered monthly. The plaintiffs before the contract was completed, closed their works and proposed to complete the contract by delivery of ship-plates of the quality mentioned in the contract made by another firm. These the defendants refused to accept. Hence the action in which the plaintiffs obtained a decision in their favour against which the defendants appealed.

At the trial the defendants tendered evidence to show that in the iron trade there is a custom that, under a contract between a manufacturer of iron plates and a customer for the supply of plates, the seller must in the absence of stipulation to the contrary supply plates of his own make, and that the purchaser is entitled to reject other plates if tendered though of the quality contracted for. This evidence was objected to by the plaintiffs and rejected, and I am of opinion that this evidence was improperly rejected, and that the defendants are at least entitled to a new trial. The contract contains no express stipulation on the question in dispute, and as this is the fact the principle of the cases is that if there is a custom or practice of the trade, the parties must be taken, as regards matters on which the contract is silent, to have dealt with reference to the practice or custom of the trade, and to have expressed in their written contract those matters for which the custom of the trade did not provide or in which in the particular case they decided to depart from or vary the custom.

But the defendants contended that they are entitled to judg-

(1) 7 E. & B. 266. 5 Jur NS 213

(2) Law Rep. 7 Q. B. 126.

(3) Law Rep. 8 C. P. 482.

1881

JOHNSON *v.* RAYLTON.

Cotton, L.J.

ment without any further trial, on the ground that under such a contract the plaintiffs, the manufacturers, are not entitled to require the purchaser to take any goods not of their own manufacture, even though the goods tendered be, as in the present case was admitted to be the fact, as good as those made by the plaintiffs.

With the exception of two recent cases in the Court of Sessions there is not either in the decided cases, or in text-books, any authority on the question thus raised. It must be considered on principle. If a picture is ordered from an artist, it must be conceded that the order is for a picture painted by him, and that in like manner when a contract for any article is made with a maker of such articles, and the excellence or value depends on the individual skill of the maker, the purchaser has a right to require the article furnished to be one made by him to whom the order is given, with such assistance only from his pupils, or servants, as must necessarily be obtained by him, or as custom or the practice or usage of the art or trade recognises or allows. Does this principle apply when the order is given to a firm? It was not and could not be denied that, where the manufacture of a person or firm has acquired with the public a name or reputation, as Broadwood's or Erard's pianos, Purday's or Lancaster's guns, a purchaser from them of articles of which they are makers is entitled to refuse any not made by the firm with whom he contracts. In such a case the purchaser relies on reputation or public opinion, that the maker to whom he goes supplies good articles. In other cases when a man contracts with a particular firm of makers for goods such as they make, in the absence of evidence that in the particular trade, or as regards the particular goods, there is a known practice that a maker of whom the goods are ordered is at liberty in the absence of such stipulation to supply goods of the kind, though made by other firms, I should come to the conclusion that the purchaser is induced to go to the particular firm of manufacturers by his reliance, in part at least, on the opinion which he forms either on his own experience, or from information of others, as to the average or general excellence of the goods which are manufactured by them. He is trusting to his own experience, or to that of his friends, as a purchaser who goes to a firm which has acquired a public reputation trusts to the opinion of the public.

But it is contended in support of the judgment that, as regards ship-plates of a particular description, and to satisfy a specified test, it is immaterial to the purchaser by whom the plates are made. I cannot agree with this argument. If the plaintiffs' contention is right, they may supply Crown ship-plates by whomsoever made. Even if Crown ship-plates of all makers which when worked up will pass Lloyd's survey are equally good, of which there was no evidence, and which in the absence of evidence I should not assume, it can hardly be contended that the average of all Crown plates supplied by all manufacturers would be equally good. This must in all cases be important, and in this contract the clause, that faulty plates are to be returned without charge for workmanship or other expenses, shews that the general average excellence of the plates to be supplied must be a material consideration. If the contention of the plaintiffs is right, they are at liberty to supply goods of any maker, and therefore, in my opinion, it is not material with reference to the question now under consideration that the plaintiffs in fact proposed to supply plates as good as those manufactured by themselves, though this would be material on the question of damages if the defendants were suing the plaintiffs for breach of their contract.

The plaintiffs relied on two recent decisions of the Court of Sessions which no doubt are in their favour. But although we ought to pay respect to the opinion on a point of law common to to both England and Scotland expressed by that Court, their decisions cannot be considered binding here, and the authority of these cases is much diminished by the fact that Lord Young dissented from the opinions of the majority of the Court. I think the views of Lord Young more correct than that of the majority, and I am of opinion that when a purchaser orders goods from a firm which is a manufacturer only of such goods, not a dealer in them, then unless it is shewn that in the particular trade, or as regards the particular goods, there is a practice or usage for the manufacturer to supply the goods of other makers, the purchaser must be assumed to have contracted with the particular manufacturers in reliance on the general excellence of the work of their firm, and is entitled in the absence of any express stipulation to the contrary, to have, in performance of the contract, goods of the manufacturer's own make.

It is said that the clause as to strikes shews on this contract a contrary intention. But this is not, I think, the necessary or fair construction of this clause. I think the clause rather assumes that stoppage of the manufacturers' works would probably prevent them from performing their contract, though notwithstanding the stoppage of the works, the manufacturers might have plates of their own make which they could supply.

The result, in my opinion, is that judgment should be entered for the defendants. For it would be for the plaintiffs to shew that the custom of the trade enabled them to supply ship-plates of other makers, and as the plaintiffs objected to the evidence tendered by the defendants, to shew the usage of the trade, we ought, I think, to assume that the plaintiffs could not adduce such evidence as in my opinion is necessary to support their contention.

Bramwell, L.J. I regret the difference of opinion that exists; considering that difference, that there is, strange to say, no English authority on this subject, the opinion of eminent Scotch judges in favour of the defendants, and the cogency of the arguments on each side, it is impossible to have a confident opinion when I say that the decision of this case ought not to be difficult. That is to say, there is no difficulty about the facts, which are few and clear, and there [is no difficulty of construction, as often happens in litigation] resulting in uncertainty, which is said to be the uncertainty of the law, when in truth it is an uncertainty of facts or uncertainty of ill-drawn documents. If there is an uncertainty in this case it is an uncertainty of the law. This ought not to be. There ought to be, and I think is, a rule by which to decide this case. That rule, I think is, that we must look at what the parties have said, add nothing to and take nothing from it without necessity, and see if the facts relied on by the plaintiffs bring this case within what has been so said. Now the plaintiffs have agreed to sell, and the defendants to buy, certain articles, ship-plates, to be made. The plaintiffs have offered to supply and sell goods. And the defendants have refused to take them by refusing to furnish the specifications according to which they were to be made. The defendants admitting that the plaintiffs would supply and the defendants would get such articles as described in the contract properly made, and which would be within it if the plaintiffs themselves had made them. So stated there is a clear breach of contract. But the defendants make this defence. They say the plaintiffs are makers of the article to be supplied, and that they being makers, it is to be assumed that the contract is for articles of the plaintiffs' make. They further say that it is so in the particular case on account of certain matters on the written contract. Disregarding these for the present, is the general proposition true in point of law that when goods which have to be made are ordered of a man who makes them, the goods are to be of his own make. Of course, if his make is a peculiar make, if he has a brand known in the market, if even he has a known name, if it can be supposed there is any pretium affectionis, it might be so. An order to Moet & Chandon of champagne of the vintage of 1881 would doubtless mean of their make, as it would if it were an order for champagne of the vintage of 1871 already made. An order for a pianoforte from Erard or Collard would mean of an instrument made or to be made by them respectively, so, perhaps, of clothes from a renowned tailor. But is the proposition true of an article not so situated, articles of which one maker's make is as good as another's, and which have no special repute or name or other distinction. This is a pure question of law. I answer it in the negative. I know no authority for it; I know no reason for it; on the contrary, there are reasons the other way. A manufacturer would agree to sell goods at a lower price if he might supply them of his own make or that of some other maker in case of need as in this case. To the buyer it would be a matter of indifference if he got the goods he bargained for, and the responsibility of his vendor for them. It would be in practice an enormous inconvenience to hold otherwise. It is obvious that whatever reason there is for saying that goods to be made ordered of a manufacturer means goods of his make equally applies to shew that when made goods are bought of a maker there is an implication that they are his make. There must be hundreds of manufacturers in which the manufacturer buys the article he makes in a complete state, or partly complete, from other makers, and with perfect propriety sells them with no notice to the buyer that the article is not his entire make. Would it be reasonable or convenient to say that he has broken some implied agreement between him and the vendor? It seems to me to be unimportant that the thing is to be made. If I order 10,000 bags of a maker which he has not in stock, he must make them or get them, and there is as much reason for holding that he warrants those he has, if he has them, to be his make, as there is that he will make them himself if he has them not in his stock. A man buys a watch which was made or half made out of the seller's factory. Has he a right of action against the seller on an implied warranty that he made it? or he buys a chair of an upholsterer, would he have a claim if the upholsterer had bought part of the stock of another maker including that chair? It may be said that in the cases I have put watchmakers and upholsterers buy and sell things not of their own make. For aught I know they may, and so I say does every maker, *if it suits him*, where there is no speciality in his own make. Suppose a man is a maker, and also a dealer in the article, that is, a buyer from others and a seller, what is the implied contract then? That when he sells he shall sell his own make unless he bargains to the contrary? Suppose the buyer does not know that the seller buys of others, has he then a right to insist on the seller's make, and not if he does know it? To hold that it was part of the bargain that they should be of the vendor's make is to insert a term in the contract that the parties might have put in for themselves, and this ought never to be done without some most cogent consideration: *Stokes* v. *Cox*. (1) I hold, therefore, that where goods are bought which are as good when of one man's make as of another's, there is no agreement by the seller, though a maker, that the goods shall be of his make. And that this is true whether the article is already made or is to be made. But it is urged that is not to be assumed that ship-plates are articles of which one maker's make is the same as another's, and that there was no evidence that it was so. I under-

(1) 1 H. & N. 320, 533.

stood that this was admitted by the defendants. If not, I cannot but think that the burden of proof was on them. The plaintiffs say, We were ready to supply goods such as you had ordered. The defendants say, Yes, but they are goods of such a description that they differ according to the maker. That there is a quality or repute or name attached to your make, and that in ordering of you we must be taken to have ordered your make. So stated it is manifest that the burden of proof is on the defendants. But then it is said that there are matters in this contract (which is in writing) which shew that the goods were to be of the vendor's make. What is relied on is that the plaintiffs are mentioned as manufacturers, and their factory is mentioned, and their trade-mark. In my judgment no value ought to be put on these. The matters in question are in print on the form commonly I assume used by the plaintiffs, and would have been there if the contract had said in express terms that the goods might be of any maker's make. If these things were used with any intent to express what is attributed to them, is it not strange that that intent was not expressed in terms? I cannot set any value on this. But there is one thing in the contract which I think strongly shews that it was not necessary that the articles to be supplied should be of the plaintiffs' make. If the manufacturer is stopped by strikes the delivery by the plaintiffs *may be* suspended. This seems to contemplate that it will not necessarily be so, which can only be if the articles might be made by some other maker. I come to the conclusion then that we cannot give judgment for the defendants.

I do not discuss the Scotch cases. They are not binding on us as authorities, though of the greatest service, as containing the opinions and arguments of able and accomplished lawyers. I have endeavoured to avail myself of them. With two exceptions, the opinions are the same as that which I have formed. I think the reasoning of Lord Crayhill unanswerable. As to that of Lord Young, I respectfully say that he merely states what in his opinion is the law of implied agreement, viz., "I venture to think it is a generally, if not universally, true proposition that such a contract made with the manufacturer of an article to be made and supplied under it, implies that the article shall be his manufacture." He gives no reason why, and does not deal with the case of an article ready made bought of the maker. Further, he begs the question when he says, "a supply from other works is not according to the terms of the contract," and, with submission, gives a bad reason when he says, "the partners are not bound to implement it all unless they can do so from their own works." They are not bound, indeed, but have the right. But I regret to say I think there must be a new trial. I think the evidence rejected was admissible. It is true it alters the contract as I interpret it, but it does not alter any of its express terms, it does not contradict it. The implied meaning of the contract, is, as I think, that the goods may be of any maker's make; if it had said so in words, the custom would contradict it, as it is, it only displaces the implication. As has been said, all customs, when proved, alter the contract as it would be without them. I cannot distinguish this case from *Jones* v. *Just.* (1) I think, therefore, there must be a new trial. I regret, for the reasons given by Lord Wensleydale, and also because I have a strong opinion that any evidence that may be given in support of this alleged custom would be evidence to shew that whenever any one orders any goods of a maker, he expects that maker's make. That, of course, would not be enough. I dare say it is a common expectation. I dare say it existed in this case; but that is very different from an agreement, and very different from a custom in a particular manufacture.

BRETT, L.J. In this case the material facts for consideration, as it seems to me, are that the contract was made by the defendants without an inspection, or the means of inspection, by them of the goods—that is to say, upon the terms of there being no inspection by the defendants; that it was a contract made with the plaintiffs as persons assuming to carry on the business of manufacturers of such goods as were the subject-matter of the contract, and not assuming to deal in such goods in any other character; that the subject-matter of the contract was iron ship-plates, some of which, after inquiring, I understand may be kept in stock and be applied with some manipulation to any ship, but others of which must be made to fit the parts of the particular ship for which they are required, and therefore must be made according to specifications or patterns to be supplied by a shipbuilder; that the contract was made in writing by means of an order in writing filled up and signed by or for the defendants on a form of order supplied by the plaintiffs; and of an acceptance of such order by the plaintiffs in writing signed by them; that the order had a heading bearing the initials and mark of the plaintiffs; that it contains a stipulation binding on the plaintiffs, that the plates should satisfy a Lloyd's survey, and it contains a strike clause; that it does not contain any express stipulation that the plates should be of the plaintiffs' manufacture. There was an admission that the plates, which the plaintiffs were ready to deliver, though they were not manufactured by the plaintiffs, would be substantially as good as if manufactured by the plaintiffs. Upon the construction of the contract itself, I do not agree that the heading of the order is no part of the contract or is outside the contract. I think it is a part of the contract, and imports an obligation on the plaintiffs that the iron plates would bear their mark or brand. But it seems to me that it has no effect on the question we have to determine; because I think the obligation contained in it might be satisfied, although the plaintiffs might be entitled to supply plates not manufactured by themselves. As, for instance, although they might not legally affix the registered trade-mark of another manufacturer to plates manufactured by themselves, yet if, in order to supply the defendants' order, they bought from another manufacturer goods made by him with his mark or brand on them, I know no law which prohibits them from effacing the other manufacturer's mark and substituting their own or from adding their own mark or brand to his. And in either case they would satisfy the stipulation of delivering plates marked with their own brand, thereby enabling the purchaser to refer to them in case any plate should be rejected by a Lloyd's surveyor. Neither do I think that the stipulation as to satisfying Lloyd's survey affects the question we have to determine, because that may equally exist whether the suggested stipulation as to manufacture by the plaintiffs is to be implied or not. That is an independent and additional undertaking by the plaintiffs. And so as to the strike clause, which, in my opinion, would, if the suggested stipulation were implied, have ample effect, thus, that upon a strike at the plaintiffs' works they might exercise their discretion whether they would procure other workmen and continue the work under the contract, or stop, and so in the case of a strike at the defendants' works, they might exercise their discretion whether to take delivery or stop. In either case the decision would probably depend on the value of the contract to the person who had to exercise the option. The question, therefore, for decision, seems to me to be whether, upon an order given and accepted, or a contract otherwise made with a person holding himself out to be a manufacturer of certain classes of goods, and not holding himself out as otherwise dealing in them, for the purchase and sale of such goods as such manufacturer professes to manufacture, the order being given or contract made by a purchaser who deals upon the terms that he is not to inspect the goods, there being no express stipulation that the goods are to be of the manufacture of the manufacturer, there is an implied stipulation that the goods shall be of the manufacture of the manufacturer who is thus to supply them. The question being thus stated, it seems to me that it cannot make any difference whether the goods happen to be in existence, or in stock, or whether they have still to be made when the contract is entered into. The terms of the question embrace equally both positions. It seems to me useful, in order to present the question clearly to one's mind, to consider what is the alternative if there be no such implication as is suggested. If there be not, what are the contracts imposed upon the manufacturer under the given circumstances with regard to the nature or quality or making of the goods? One is that the goods shall be merchantable; another is that they shall be reasonably fit for the purpose for which they are ordered. I know of no other implied contract as to the nature or make of the goods. There is no contract that they shall be equal to the ordinary make of the manufacturer himself, or equal to the ordinary make of any other manufacturer, or to the ordinary make of all manufacturers of similar goods. It has been suggested that if the manufacturer have a mark or brand of his own known in the market, or if his goods have a known character in the market, that then the suggested contract may be implied. But if the manufacturer does not propose different prices for goods manufactured by himself as distinguished from goods not so manufactured, I can see no reason why, unless the implication is to be made in all cases, it is to be made in the given cases. It is perfectly possible that the purchaser would know nothing about such mark or such character, or the value of either. And if not, there being no difference in price, why should there be imposed on the manufacturer an increased liability in favour of such a purchaser, because the manufacturer has a good trade character? If then there is no other contract binding on the manufacturer in the absence of the suggested one, but the two I have above mentioned, it is immaterial to inquire whether the goods, the subject-matter of the contract, are such as in ordinary circumstances one manufacturer makes substantially as well as another. It was immaterial to consider in this case, as affecting the liability of the defendants to accept the goods, whether the goods which the plaintiffs were ready to deliver were as good as if manufactured by the plaintiffs themselves. That would be evidence material upon the question of damages, if the defendants were liable for a breach of contract for not accepting such goods as are the subject-matter of the contract in question, but not material as to the question whether there was or was not a breach of contract by not accepting them. If, then, there be no such contract as is suggested, a manufacturer under the stated circumstances may supply goods not manufactured by himself inferior to his own usual manufacture, inferior to the usual manufacture of the person from whom he has purchased, inferior to the usual standard of manufacture by other manufacturers of similar goods, the goods of a manufacturer to whose manufacture the purchaser, whether with good reason or from fancy, has objected, and with whom on account of such objection the purchaser has ceased to deal, and to whom on account of such objection he has preferred the manufacturer with whom he is now dealing. If only the goods supplied be merchantable and reasonably fit for the purpose for which they were ordered the purchaser must accept them, notwithstanding any of these objections he may feel. The question, therefore, really is, whether the suggested contract is to be implied from the fact of the order being given or contract made with a person holding himself out to be a manufacturer of such goods, and not holding himself out as otherwise dealing in such goods, or whether the purchaser, buying without inspection, is bound to be content with the alternative and its consequences thus pointed out. It seems to me after long consideration to be more consonant with the ordinary simplicity of fair mercantile business, and more in accordance with legal principles, to say that he, who holds himself out to be a selling manufacturer of goods and does not hold himself out as being otherwise a dealer in such goods, does hold out to a proposing purchaser that what he (the manufacturer) offers to do on an order given to, or contract otherwise made with, him for the supply of goods such as he professes to deal in is that he will supply goods manufactured by himself. And it seems to me that it is more reasonable to assume that the purchaser contracting under such circumstances will rely as matter of right upon receiving goods manufactured by the manufacturer with whom he deals, than to assume that he will run the risk of the alternative consequences I have pointed out. Such a holding out and such a reliance make a contract, or a term of a contract, that the goods supplied shall be of the manufacture of the manufacturer. Several objections were made to this view; as that in certain trades it is known that a manufacturer to whom an order is given fulfils it by delivering goods manufactured by other makers. The shoe trade of Northampton was mentioned as an illustration. If such a mode of fulfilling such a contract is generally known to both buyers and sellers in a particular manufacture, such an usage would negative the suggested implication. That state of things in a particular trade does not destroy the general proposition. It was suggested that if the implication exists the absence or death of a partner in the manufacturing firm would render the contract impossible of performance by the manufacturing firm. But the implied contract seems to me in reason to be not that the goods shall be manufactured under any particular personal superintendence; it is well known to all men of business that manufacturing work is not so done; but that the only binding stipulation is that the goods shall be of the manufacture of the manufacturer, understood in the ordinary business sense of that phrase, i.e., made by the ordinary appliances of the manufacturer's works. It was suggested that the implication would require every part of the manufactured article to be made in the factory of the manufacturer, as every wheel of a watch to be made by the watchmaker, or every part of a carriage by the coachmaker; but in such cases the article which is the subject-matter of the contract is the article made up of different parts; and the parts before they are put into that article so as to form it are not the subject-matter of the contract. It was suggested that a great manufacturer would not without the power of employing others be able to fulfil his contract, but if it be held that the implied contract does arise, where a manufacturer has a known good brand or a known good work, then it is precisely the greatest manufacturer who will be deprived of the suggested necessary power. I cannot think that these objections should prevail. As to authority, there are only the Scotch cases, which are to be treated with every respect. I notice, however, that the Lord Ordinary and Lord Young agree with the view which I in the end think right, and that Lord Giffard founds his judgment on a view of the particular evidence in the case before him, and does not deal with the general proposition at all. He relies upon evidence, which, he says, was preponderating "that in such contracts it is of no consequence who makes the plates, and that one maker often supplies plates procured from other makers." If such a practice in the trade was generally known to buyers and manufacturers, it seems to me, as I have before said, that the suggested implication cannot be made. The authority of the Scotch judges is a balance of high opinions. The remaining point is, what is the proper result of the opinion at which I have arrived. Let me say that I have arrived at it after many doubts and with much hesitation, the greatest cause of doubt being the opinion of Bramwell, L.J. The logical conclusion is that judgment should be entered for the defendants. I think it better for the parties that we should order such a judgment, so that the case may be taken, as I think it should be taken, at once to the House of Lords.

---

(1) Law Rep. 3 Q. B. 197.

Judgment reversed.

Solicitors for plaintiffs: *G. & W. Webb.*
Solicitors for defendants: *Van Sandau & Cumming.*

W. P.

1881
April 1.

[IN THE COURT OF APPEAL.]

BRADFORD *v.* SYMONDSON.

Marine Insurance—Re-insurance—Policy attaching—Voyage ended when Policy effected—Risk—Action for Premium.

The defendant, who had insured a cargo by a certain vessel lost or not lost for a certain voyage, believing such vessel to be overdue, effected a policy of re-insurance with the plaintiff on the same cargo and risk.

Before effecting the policy of re-insurance, the vessel and cargo had in fact arrived safely at the port of destination; but this was not known to either the plaintiff or defendant at the time the policy was effected:—

Held, that the policy had attached, and that therefore the plaintiff was entitled to the premium at which it had been effected.

On the 3rd of October, 1879, the Phœnix Insurance Company of New York, insured by declaration on an open policy of the 22nd of September, 1876, a cargo by the *Alata*, lost or not lost, from Philadelphia to Rochfort.

On the 23rd of December, 1879, the Phœnix Insurance Company, by the defendant as their agent, effected at a premium of 75 guineas per cent. a Lloyd's policy, which was underwritten by the plaintiff, as a re-insurance to the extent of 1500*l.* on the same cargo and risk as was so insured by the Phœnix Insurance Company.

The *Alata* sailed from Philadelphia to Rochfort, on the 1st of October, 1879, with the cargo on board, and arrived safely at Rochfort on the 14th of November, 1879, discharged there her cargo undamaged, and sailed thence on the 18th of December, 1879; but at the time of effecting the policy of re-insurance of the 23rd of December, nothing had been heard of the arrival of the *Alata*, and neither the plaintiff nor the defendant nor the Phœnix Insurance Company knew that she and her cargo had then safely arrived. Under these circumstances, the Phœnix Insurance Company and the defendant as their agent, refused to pay the premium, contending that there had been nothing to insure and no risk by the plaintiff.

The plaintiff accordingly brought this action to recover the premium payable by the said policy. The action was tried before Lord Coleridge, C.J., without a jury, on the admitted facts, at the Middlesex Trinity sittings, 1880, when his Lordship gave judgment for the plaintiff for the amount claimed.

From this judgment the defendant appealed.

March 1 and 3. *Benjamin, Q.C.*, and *French*, for the defendant. At the time the policy of re-insurance was made, there was no risk to be run, and therefore no consideration for the premium, the rule is thus stated by Lord Mansfield in *Tyrie* v. *Fletcher* (1), " Where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned, because a policy of insurance is a contract of indemnity." It is admitted on the part of the plaintiff, that if the voyage had never begun there would have been no risk, and the premium would have to be returned, then, if the voyage is over and the ship has arrived safely, how can there be any risk? The re-insurance was made here under circumstances of a mistake in fact by both parties, and the premium, therefore, ought not to be payable: *Oom* v. *Bruce* (2); *Hentig* v. *Staniforth*. (3) No doubt "the insurers can, if such be the intention and agreement, make themselves responsible for a loss which has already happened when the policy is made," 2 Parsons on Insurance, p. 44, and in *Sutherland* v. *Pratt* (4) it was held to be no answer to an action on a policy on goods (lost or not lost), that the interest in them was not acquired until after the loss. "Such a policy," says Lord Wenleysdale, in that case, "is clearly a contract of indemnity against all past as well as all future losses sustained by the assured in respect to the interest assured." But, as stated in 2 Arnould on Insurance, 5th ed. p. 1057, "in case the risk had no inception, whatever may have been the cause, even the neglect or fault of the assured himself, provided it be not his actual fraud, the premium is by law to be returned." Then he says, "the general law maritima agrees with our own on this point, and is based on the same principles," citing 2 Emerigon, c. xvi. § 1, p. 186. On behalf of the plaintiff reliance will be placed on

---

(1) 2 Cowp. 666, at p. 668.

(2) 12 East, 225.

(3) 5 M. & S. 122; and nom. *Henry* v. *Staniforth*, 4 Camp. 270.

(4) 11 M. & W. 296.

2 Park on Insurance, cap. xix. 7th ed. p. 562, where there is the following passage: "If the ship be arrived before the policy is made and the underwriter is acquainted with the arrival, but the insured is not, it should seem the latter will be entitled to have his premium restored on the ground of fraud. But if both parties be ignorant of the arrival and the policy be (as it usually is) lost or not lost, I think in that case, the underwriter should retain it; because, under such a policy, if the ship had been lost at the time of subscribing, he would have been liable to pay the amount of his subscription." He, however, subsequently states, at p. 563, "The principle upon which the whole of this doctrine depends is simple and plain, admitting of no doubt or ambiguity. The risk or peril is the consideration for which the premium is to be paid; if the risk be not run, the consideration for the premium fails; and equity implies a condition that the insurer shall not receive the price of running a risk, if in fact, he runs none." In 2 Phillips on Insurance, sect. 1826, it is also said, "the risk may have terminated before the policy is made, yet if it be so made that it would have applied to any loss that might have happened during the risk no return of premium can be demanded." Here the policy of re-insurance was made on the assumption that the voyage had not terminated, and that the Phœnix Insurance Company might be liable to pay for a loss. This was a mistake; there never was any risk and the policy of re-insurance never did and never could attach. Next, the defendant never had any insurable interest when the policy of insurance was effected. "The rule in fact is, that if through mistake, misinformation, or any other innocent cause, an insurance be made without any interest whatsoever, the assured is entitled to recover back the whole premium," 2 Arnould on Insurance, 5th ed. p. 1066.

[BRETT, L.J. That second point seems to be the same as the first, for during the whole time of the insured voyage the assured had insurable interest, but as the voyage had terminated, it is said there was no insurable interest.]

There was no interest when the second policy was effected.

[BRETT, L.J. You say there was no insurable interest when that policy attached, but then when did it attach? Might it not attach to a time before it was made?]

It might cover losses before it was made, but it could not attach unless there was something then existing to which it could attach, and that was not so here.

Cohen, Q.C., and *Hollams*, for the plaintiff. With regard to the first point, there was a risk when the policy of re-insurance was made. The policy would cover past as well as future losses, and there is no condition expressed or implied that if the voyage be ended when it is made the premium shall be returned. "The form of the policy in England and the United States contains the words 'lost or not lost;' and if the subject insured be lost or has arrived in safety when the contract is made, it is still valid if made in ignorance of the event, and the insurer must pay the loss or not pay it as the case may be. This is laid down by the foreign jurists as a general principle of insurance, without reference to those words which are said to be peculiar to the English policies:" 3 Kent's Commentaries, 12th ed. p. 259. In case of fraud on the part of the insurer the premium must be returned, as if he knew at the time of making it that the vessel had arrived: 2 Arnould on Insurances, 5th ed. 1064, citing Lord Mansfield in *Carter* v. *Boehm.* (1) That would seem to imply that where the insurer did not so know of the arrival of the vessel the premium would not be returnable. The French and German law is to the same effect: Code de Commerce, Arts. 366 and 367; German Code, Art. 789. The cases of *Oom* v. *Bruce* (2) and *Hentig* v. *Staniforth* (3) are very different from the present one. They were cases where the policy was void and never attached at all. The second policy in the present case was never void, and the consideration, which in fact was the plaintiff's undertaking to indemnify against past and future losses, did not wholly fail. Suppose the vessel had been lost, being at the bottom of the sea when the policy was made, there might equally be said to be then no risk to be run, for the event was certain in the sense that it had happened, though uncertain in the sense that it was unknown, but the undertaking to indemnify against this loss would be a good consideration for the premium. There is a case of *Natusch*

---

(1) 3 Burr. 1905.

(2) 12 East, 225.

(3) 5 M. & S. 122.

1881

BRADFORD
v.
SYMONDSON.

v. *Hendewerk* (1) exactly in point, in which the late Mr. Justice Willes decided that an insurer had a right to the premium on a policy of insurance which was effected, as in the present case, after the vessel had in fact arrived at her port of destination. In Emerigon, cap. xv. § 3, ed. translated by Meredith, p. 635, it is said: "If there is no fraud, and one of the parties is not better informed than the other, the least uncertainty of the event, fortunate or unfortunate, suffices to render the insurance valid;" and referring to Valin's statement that it is one thing to know the loss of a vessel, and another to have room and even just cause for fear, Emerigon goes on to say, "In the first case the insurance is void; in the second it is valid, if there be neither fraud nor dissimulation nor false assertion."

Then as to the second point, the assured had an insurable interest, and he had it at the time the voyage commenced. This was a policy of re-insurance, and the plaintiff would stand in the place of the insurer under the first policy, and whatever that insurer would be liable to pay the plaintiff would be liable to pay.

[BRAMWELL, L.J. Suppose no goods had been shipped, the premium would then be returnable—but why?]

Because in that case there could be no possibility of liability of the underwriter on such a policy, as there would then never be a time when the assured could have had a loss during the voyage. The policy would never have attached, but when once it has attached the premium is not returnable.

---

(1) Not reported. It was an action by insurance brokers to recover the premium due in respect of a policy of insurance against war risk only, effected by them for and at the request of the defendant on the *Friede*, a German vessel, on a voyage from Dantzic to Hull, during the war of 1870 between France and Germany. Some few hours before the policy was effected, the *Friede* had arrived safely at her port of destination, but the insurance was ordered and effected in ignorance by either party of such arrival, and upon the supposition that the said vessel was still at sea. By arrangement the action was not tried at Nisi Prius, but left to the decision of Willes, J., who heard the case at chambers in April, 1871, where it was argued on the admitted facts by *J. C. Mathew*, for the plaintiffs, and *Cohen, Q.C.*, for the defendants. That learned judge was of opinion that in the absence of knowledge that the vessel had arrived at Hull, the policy ought to be treated as a contract that during the voyage, which was an existing one, the vessel, which was also an existing one, had not been and should not be captured, and that if the policy did so protect the assured from any damage that might have been sustained, it was difficult to see why the underwriter was not entitled to his premium. He accordingly directed a verdict to be entered for the plaintiffs for the amount of their claim.

Benjamin, Q.C., in reply. Emerigon is not always to be relied on. The passage cited from Emerigon is not to be reconciled with the passage by the same writer at page 636 of Meredith's edition. He there states that he was consulted in 1781 on an insurance made at Marseilles on cargo of a vessel already arrived in the port of that town, and that the insurer contended that the premium was due to him, because at the time of signing the policy he did not know the return of the vessel, but that he, Emerigon, was of a contrary opinion, stating that the risk on goods of a vessel already arrived at the port of its destination had never been made by itself the subject of a maritime insurance.

Cur. adv. vult.

April 1. BRETT, L.J. It is proposed that I should give judgment first in this case. The action is brought for the recovery of the premium payable on a policy of insurance effected by the defendant with the plaintiff, and the defence is that the policy never attached. The policy was underwritten by the plaintiff by way of re-insurance of a cargo by a certain vessel from Philadelphia to Rochfort which the defendant had insured. The vessel had not only sailed from Philadelphia to Rochfort with the cargo on board, but the voyage had been completed with safety and without any damage to the cargo whatever, when the re-insurance was made by the defendant with the plaintiff, but this was not known to either party at the time this policy was entered into. It was supposed then that the vessel was overdue (and the policy was therefore made at a very high premium), though I think that that is a fact which is wholly immaterial, and that the same question would have arisen if the parties had not supposed the vessel was overdue.

The great question in this case was whether this policy of re-insurance had attached at all, and it was said that it had not because at the time it was entered into, the risk had determined, and there was no risk in existence. If one examines that proposition carefully, it really comes to this, that at the time the policy which is the subject-matter of this action was entered into, the question of whether there was, or could be a loss or not, was determined in fact, and to this extent that there could be no loss. Now this policy covers the risk which the defendant, or those for whom he was acting as agent, were supposed to be under upon the policy made by them as insurers. Therefore, the risk insured by this policy is in terms the risk under which the assured stood on the policy made by them during the voyage described in their policy. So it is obvious that the risk of the plaintiff existed during the whole of the voyage described in this policy. But then the objection is, that when the present policy was in fact made, the question, of whether any loss could or could not be sustained by the assured, was in fact determined. Is that a good objection to the attachment of a policy? It seems to me that it is not, because if stated in those terms it applies to a policy of lost, or not lost, and the fact that the ship, or goods, the subject-matter of the policy has been lost at the time the policy was made, would be destructive of the attachment of the policy which is not true, as every one knows. Indeed the decisions, or at all events the dicta of Lord Mansfield, and others of the greatest insurance judges in England, have gone as far as this, that if both parties knew that the subject-matter was lost at the time when they entered into the policy, and the policy in terms covers that loss, the policy is good. As for instance, if the parties have verbally agreed to the insurance, or have passed a slip at the time, when the passing of a slip was supposed to have had no effect, but as an undertaking of honour, nevertheless if having done so the underwriters, when the loss was known to both parties, entered into the policy, it would be, as was said by Lord Mansfield, according to the law of England, a good policy. Therefore, it seems to me, upon principle, that the fact, that the question of whether there was a loss or not, was determined before the making of the policy, is no objection to the policy.

How then stand the authorities? Mr. Benjamin was bound to admit, as far as I could see, that every writer on Insurance Law was against the view proposed by him. Emerigon was against him, but then he objected to the authority of Emerigon. It is true that Emerigon is not always an authority to be followed;

but, nevertheless, he is always quoted as an authority with regard to Insurance Law, and his language is certainly to be carefully considered before it is rejected. But Park on Insurance was against him, and Park on Insurance has always been cited by judges in England and America as a book of considerable authority. Then Arnould was against him, and so was Phillips, and I venture to say that, of all the great text authorities upon Insurance Law, Phillips is the one most to be considered. Therefore, all the text-books, as far as I can see, are in support of what seems to me to be the right view according to principle. Moreover, we have the high authority of Mr. Justice Willes in the case of *Natusch* v. *Hendewerk* (1), which is substantially directly in point. It was an action for the premium paid on effecting a policy, and the question was raised whether the fact of the voyage having been ended, if unknown to both parties at the time, prevented the policy from attaching, and that learned judge held that it did not.

Therefore, it seems to me both on principle and authority, that the mere fact of the voyage insured having been at an end, did not prevent the policy of re-insurance from attaching, and if so the premium is due.

But then it was said there was no insurable interest on the part of the defendant, or those for whom he was agent under the policy, the subject of this action.

Now what was the insurable interest of the assured under this policy? The insurable interest was the risk which he ran under the former policy. If this policy therefore attached, it attached in respect of the voyage insured under that first policy, and during the whole of that policy the risk of the Phœnix Company under it did exist, and, therefore, it seems to me that the question of insurable interest in this case comes to be the same question precisely as the question whether the risk ever attached. If the risk attached, and as long as it attached under the first policy, or under this second policy, the defendant's interest attached for the same time and during the whole of the same period. Therefore there was an insurable interest. This decision seems to me to come to this, that ~~w~~ere the subject-matter insured h/

---

(1) Ante, p. 460, n.

has been, or is or will be, at risk, the policy attaches to it and covers it, whether the policy be made before, or during, or after the time when the subject-matter was at risk; if that risk is properly described in the policy. I think, therefore, that the judgment for the plaintiff was right.

BAGGALLAY, L.J. I am of the same opinion, and I have nothing to add.

BRAMWELL, L.J. I will add a few words, in confirmation of what has been said by my Brother Brett. On the question of whether the policy attached, I think it did. The fallacy in the defendant's argument arises from the double meaning of the word risk. That means both the voyage commenced with necessary conditions to make the underwriters liable, and also the chance of loss during its performance. In the latter sense there was no risk at the time of re-insurance. But that is not the sense in which the word is used by the authorities. It is used in the first sense I have mentioned, and in that sense it clearly existed in this case. There was, therefore, a risk such that if the premium had been paid the defendant could not have recovered it back. Suppose it had been known to both parties that the ship had arrived for twenty-four hours, and still the defendant had been minded to re-insure, and had done so at a low premium, it cannot be doubted that the premium would have to be paid. If that is true of twenty-four hours, it is equally so of twenty-four or any other number of days, and if it is true when both parties know, it is equally true when they do not.

I think, therefore, the policy attached. All the authorities, as my Brother Brett says, who have expressed an opinion on the matter, are in favour of this view. And the utmost that can be said of the others is that they do not decide it one way or the other. It is said that the same considerations determine the other question in favour of the plaintiff. On this I confess I am not so clear. It is said that the interest of the defendant was in his possible liability, and that the existence of a loss being uncertain to his knowledge, he might insure against it. I am not altogether satisfied on this. Suppose an insurance warranted free from capture, and suppose a re-insurance on the same terms on the same voyage, but the ship captured before re-insurance, would the insurer have an insurable interest? I doubt it. But as my Brethren do not, and as I only doubt, I concur on this point also.

Judgment affirmed.

Solicitors for plaintiff: *Waltons, Bubb, & Walton.*
Solicitors for defendant: *Field, Roscoe, & Co.*

W. P.

[IN THE COURT OF APPEAL.]

April 2.

ROBINSON v. CURREY.

Penalty, action for—Limitation of Time—Selling Silver Wares with Counterfeit Mark—"Party Grieved"—7 & 8 Vict. c. 22, s. 3—3 & 4 Wm. 4, c. 42, s. 3—Common Informer—31 Eliz. c. 5.

An action by an officer of one of the Company of Goldsmiths mentioned in 7 & 8 Vict. c. 22, for penalties under s. 3 of that Act, is not an action by a common informer within 31 Eliz. c. 5, nor is it an action by a "party grieved" within 3 & 4 Wm. 4, c. 42, s. 3, and consequently can be brought more than two years after the cause of action accrued:—

So *held*, reversing the judgment of the Queen's Bench Division.

APPEAL by the plaintiff from the judgment of the Queen's Bench Division. (1)

The plaintiff was deputy warder of the Company of Goldsmiths in London, and he sued as such officer on behalf of the company under 7 & 8 Vict. c. 22, s. 3, for several penalties of 10*l.* each, in respect of the offences of selling wares of silver with a counterfeit imitation of the marks used by the company for marking silver wares. The defence was that the cause of action did not accrue within two years before action brought.

To this defence the plaintiff demurred, and judgment was given on the demurrer for the defendant. The plaintiff appealed from this judgment.

March 29; April 1, 2. *A. Wills, Q.C.*, *Webster, Q.C.*, and

(1) 6 Q. B. D. 21.

Coxon, for the plaintiffs. The point is whether the Goldsmiths' Company in London in suing for the penalties under 7 & 8 Vict. c. 22, s. 3, are "parties grieved" within the meaning of 3 & 4 Wm. 4, c. 42, s. 3, which limits "actions for penalties given to the party grieved" to two years after the cause of such action. There is a further point, namely, whether the company are within 31 Eliz. c. 5, which would limit the time for bringing the action to one year. The judgment of the Court below proceeded on the ground that the Goldsmiths' Company in London were "parties grieved" within 3 & 4 Wm. 4, c. 42, s. 3. There are several companies of goldsmiths in England described in the Act of 7 & 8 Vict. c. 22, who use their own marks or stamps for marking or stamping gold or silver wares, and forging or counterfeiting any die used by any of these companies, or any mark of such die is by s. 2 made a felony, punishable with transportation for seven or fourteen years. The 3rd section which imposes the penalties sought to be recovered in this Act, states that the same "may be sued for and recovered by any of the several companies of goldsmiths," so that the London Goldsmiths' Company may sue for the penalty in respect of an imitation of the mark of the Goldsmiths' Company at Exeter, and vice versâ. By the 10th section the penalty is to be "sued for and recovered in the name of any officer of the said several companies to which such officer shall belong, to be applied by such company in defraying the expenses of their assay office, and of detecting and prosecuting offenders against this Act." No profit is made out of the assay, and none of the companies can properly be said to have any grievance in the matter, or to sustain any damage by the sale of gold or silver wares with counterfeit marks thereon. Anterior to 3 & 4 Wm. 4, c. 42, there was no limitation of time to the recovery of penalties given to the party grieved, though by 31 Eliz. c. 5, there was a limitation of time to actions by the common informer. The party grieved must be the party who has suffered a damage. There are several statutes where in this respect the penalty is given to the "party grieved," viz., 23 Edw. 3, c. 6, 1 Mary, c. 12, 5 Eliz. cc. 9, 21, 23, and 27 Eliz. c. 4. There are statutes relating to a class of cases resembling the present one in which the penalty, instead of being given to the party grieved, is given to some public body in discharge of a public duty, such as 8 Eliz. c. 13, s. 14, which, respecting the penalty for injuring beacons or sea-marks, gives half to the Queen and the other half to the master and wardens of the Trinity House; 13 Eliz. c. 11, where for outrages on the coast of Norfolk half of the penalty is given to the Queen, and half to the bailiffs and burgesses of the town of Great Yarmouth; 1 & 2 Ph. & M., c. 14, s. 9, which gives half of the penalty in respect of fustians of Norwich lacking a certain length and breadth to the mayor of the said city, and half to the wardens of the fellowship of the said city; and 2 & 3 Ph. & M. c. 8, s. 4, which gives all fines for any offence against that Act for the mending of highways, to the churchwardens of every parish wherein the offence shall be committed. The term "party grieved" was well known at the time of passing 7 & 8 Vict. c. 22, but the penalty is not given to such a party, but to any of the companies mentioned in the Act, and such have to discharge a public duty. *Boyce* v. *Higgins* (1) is an instance of a person not being entitled to sue for a penalty as a party grieved, who is not otherwise aggrieved than as one of the public. The case of *Shinler* v. *Roberts* (2) referred to by Field, J., in the Court below, was a case of a party grieved. Then, secondly, the Goldsmiths' Company do not sue for the penalties under 7 & 8 Vict. c. 22, as common informers, but as one of a specified class to whom the Act gives the penalty, and therefore they do not come within 31 Eliz. c. 5. A common informer is not of a class so designated, but any one of the public who sues for a penalty which is given by a statute to such as will sue for the same, and he does not acquire his right to it until he has not only brought his suit but obtained judgment: 2 Blackstone's Commentaries, Book II. chap. xxix. s. 7, sub-s. 1. The 23 Jac. 1, c. 4, directed against vexatious informers, required, inter alia, the oath of the informer that the offence was committed within a year before suit. This Act is commented on by Lord Coke in 4 Inst. cap. 88, p. 192, and is treated by him as directed entirely against the common informer; and because of the inability of a corporation to satisfy the condition of making the oath required by 23 Jac. 1, c. 4, a corporation could not be common informers: *Guardians of*

---

(1) 14 C. B. 1; 23 L. J. (C.P.) 5.

18 Jur 333

(2) B. N. P. 197.

St. Leonard's, Shoreditch v. *Franklin.* (1) In *Dyer* v. *Best* (2) the action was by a common informer, and no such question arose as in the present action. The first statute on the subject limiting the time for these actions was 7 Hen. 8, c. 3, and dealt with three classes, viz., 1st. the actions by the King; 2nd. the actions by the King and an informer; and 3rd. by the informer only. The 31 Eliz. c. 5, repeals 7 Hen. 8, c. 3, and deals with only two classes, viz., 1st. the actions by the Queen; and 2nd. the actions by the Queen and an informer; and the first reported case on this last statute is *Calliford* v. *Blawford* (3), where it was held in the Exchequer Chamber by the majority of the judges, that where the informer ought to have the whole penalty, and was therefore not suing qui tam, the 31 Eliz. c. 5, did not extend to it, and this was adopted and followed in *Chance* v. *Adams.* (4) There is no trace of any case contrary to this until that of *Lookup* v. *Frederick* (5) cited in Buller's Nisi Prius, 7th ed. p. 195. There was no necessity for holding the action there to be within 31 Eliz. c. 5, as there was an effectual limitation by the statute of 23 Jac. 1, c. 4, requiring the affidavit by the informer. Then *Dyer* v. *Best* (2) was decided according to *Lookup* v. *Frederick* (5), and contrary to *Calliford* v. *Blawford.* (3) It is true that Pollock, C.B., referred to *Barrett* v. *Johnson* (6), as a decision of the Irish Exchequer in favour of 31 Eliz. c. 5, being applicable to all classes of penal actions, but that case was decided upon, 23 Hen. 8, c. 21, which had not been repealed like 7 Hen. 8, c. 3, which it resembled, and therefore the defendant had there the protection of that Act which required the action to be brought within one year. The Irish case consequently does not apply, and there is nothing to alter *Calliford* v. *Blawford.* (3) If *Dyer* v. *Best* (2) was wrongly decided, the plaintiff is entitled to maintain this action, and so he is even if *Dyer* v. *Best* (2) be upheld, for the penalty is given by 7 & 8 Vict. c. 22, to a specified class, and not to a common informer. The objection is not true that if this class of action is not within the limitation of two years there would practically be no limitation of time for an action for these penalties, for the action is on a speciality for which the period of twenty years is limited by 3 & 4 Wm. 4, c. 42, s. 3: *Shepherd* v. *Hills* (1) and *Cork and Bandon Ry. Co.* v. *Goode.* (2)

---

(1) 3 C. P. D. 377.

(2) Law Rep. 1 Ex. 152.

(3) 1 Show. 353; Carth. 232, nom. *Culliford* v. *Blandford.*

(4) 1 Ld. Raym. 77.

(5) 4 Burr. 2018.

(6) 2 Jones (Ir. Ex.) 197.

Crump, and *W. F. Jones* (*Sir J. Holker, Q.C.,* with them), for the defendant. On reference to the history of the Goldsmiths' Company, given in Chaffer's work on Hall Marks, pp. 5–7, shewing the privilege granted to them of assaying gold and silver by 28 Edw. 1, c. 20, the ordinance in 1336 providing for the marking of gold and silver at the Hall of the Mystery, the charters granted to the Goldsmiths' Company in London in 1392 and 1504, and the 18 Eliz. c. 15, imposing a penalty on the corporation, if plate shall be found to be falsely marked by the wardens or masters of that mystery, it will be seen that the company have both an interest and a duty in having plate marked with their proper hall mark. Then 7 & 8 Vict. c. 22, s. 3, which imposes the penalty, the subject of this action, states that it may be sued for by any of the several companies who have been before specified in the Act, and as pointed out by Field, J., in his judgment, the previous Act on the same subject, 12 Geo. 2, c. 26, s. 22, which gave the penalties under that Act partly to the Crown and partly to the common informer, having been repealed, it was reasonable that the penalties should be given to the goldsmiths' companies whose marks had been counterfeited. It does not appear that any of these companies have a local area to which their jurisdiction is confined, and as the offence under s. 3 may be committed anywhere, any of the companies mentioned in the Act may sue for it. They are all branches only in effect of one another, and all are equally grieved if the mark of any of them is counterfeited, and the penalty imposed by the Act is really given as a satisfaction for the injury sustained by counterfeiting or interfering with such mark.

It is not necessary to contend that the Goldsmiths' Company are common informers, and as such within 31 Eliz. c. 5, for they are really parties grieved and barred by 3 & 4 Wm. 4, c. 42, s. 3; but there are only two classes in penal actions, "informers" or "parties grieved," and if this company does not come under the second they must come under the first of these. When the Crown sues for a penalty it is to be treated as suing for it in the position of an informer, and so when the Trinity Corporation or the Goldsmiths' Corporation form the class mentioned as the body to bring the action, they may be considered to sue in the position of informers. Therefore, if they sue as parties grieved, they are barred by 3 & 4 Wm. 4, c. 42, s. 3, and if as informers, they are barred by 31 Eliz. c. 5: *Dyer* v. *Best.* (1) If not within one or other of these statutes it would be a casus omissus, and as observed by Field, J., in his judgment, "is it reasonable to suppose that the legislature when passing a general Act with respect to the limitation of actions for penalties by parties grieved should have omitted so large a class of actions as this?" In *Lewis* v. *Davis* (2), Lush, J., says, "Does not a party grieved mean the party grieved according to the provisions of the legislature?" and "the statute of Elizabeth applies to all informers, whether they are parties grieved or not."

---

(1) 11 Ex. 55; 25 L. J. (Ex.) 6. (2) 13 C. B. 826; 22 L. J. (C.P.) 198.

17 Jur 455, 1057

A. Wills, Q.C., in reply. The statute 12 Geo. 2, c. 26, has not been entirely repealed, it was only repealed in part by 30 Geo. 3, c. 31, s. 1, and by the Statute Law Revision Act, 1867 (30 & 31 Vict. c. 59), and ss. 3, 5, 21, and 22 remain still unrepealed.

[He was then stopped by the Court.]

BRAMWELL, L.J. With great respect, both for the opinion of Mr. Justice Field, and of Mr. Justice Manisty, I do not think that their judgment can be upheld. I think that the fallacy which has led to it has arisen from supposing that all actions for penalties were brought either by common informers or the parties aggrieved, and consequently that every man suing for a penalty was in one or other of those two classes.

Now I really cannot understand how this can be said to be an action by a party grieved. The expression "party grieved" is not a technical expression; the words are ordinary English words, which are to have the ordinary meaning put upon them; and the Goldsmiths' Company cannot properly be considered to be parties grieved. A party grieved is not brought into existence by the statute which gives him a penalty, he is a person who is

(1) Law Rep. 1 Ex. 152.

(2) Law Rep. 10 Ex. 90, 91.

supposed to exist, and the statute is passed on account of his grievance, and the action for penalty is given to him. There may be cases in which the statute states who is the party grieved, as where it says that A. B. shall be deemed a party grieved, but a party grieved is a person who exists, and on account of his existence and his grievance the statute gives him a remedy.

I asked Mr. Crump if he could suggest that this company, or any of these companies, or all of them put together, could maintain any action against the defendant, and he was compelled to admit that they could not, and that no such action would be maintainable, therefore it seems to me that this is not an action by a party grieved. It is said, then, that the case is in a dilemma, for if it is not an action by a party grieved, it is an action by an informer within the statute of Elizabeth.

Now the statute of 31 Eliz. c. 5, in terms is applicable only to proceedings by the Crown and to proceedings qui tam, and it was held in the time of Lord Holt, in *Calliford* v. *Blawford* (1), that that statute did not apply to the ordinary action of a common informer suing for his own benefit.

Well, if that be so (and that decision was confirmed in the Exchequer Chamber and remains unimpeached) it would cover this case, even supposing the company were suing as common informers, because there would be no statute of limitations applicable to them except 3 & 4 Wm. 4, c. 42.

It is said is it conceivable that there is no statute of limitations applicable to any action of debt by a common informer? A common informer must make an oath that the cause of action arose within a year, and it is not to be assumed that he would take a false oath, and if he did do so wilfully or by mistake, and the action was not brought within a year, I am satisfied that it would be the duty of the Court to stay the proceedings.

When I consider that the words of the statute of 31 Eliz. c. 5, do not include an action by a common informer, I confess I prefer the authority in the Exchequer Chamber of *Calliford* v. *Blawford* (1), and the construction there put upon the statute in the time of Lord Holt to that in the time of Geo. III. in the case of *Lookup* v. *Frederick* (1) and the subsequent case of *Dyer* v. *Best.* (2) This alone would be sufficient to determine this matter in favour of the plaintiff, but I am satisfied that the people suing for penalties are not to be confined to two classes. There is the Crown suing for the Crown's own profit, and the informer suing qui tam, or for his own mere profit and benefit, and in addition to these, there is the informer suing for a penalty in pursuance of a public duty as a kind of public prosecutor, upon the same principle upon which he might prosecute an indictment at law, if an indictment would lie where a thing is prohibited and no penalty is fixed. Then it is said, is it conceivable that such a person is under no limitation as to time? If on that account he is to be put in the statute of Elizabeth, though he is not within its words, the expression casus omissus had better be banished from our language, because it would be equivalent to saying, that there never could be a casus omissus. But, besides, I think that a common informer who sues for his own benefit, or who sues qui tam, is in a different position from one who is prosecuting for the benefit of the public, and I do not see why any particular restriction should be put upon the time within which such last is to bring his action for penalties, any more than there would be upon the time within which he should prosecute an indictment against a person for an act which had been prohibited and to which no penalty attached. To my mind this case was not within the contemplation of the legislature, and it is not a casus omissus, because the legislature was not dealing with or thinking of cases of a public prosecutor, or of prosecution at all.

---

(1) 1 Show. 353; Carth. 232, nom. *Culliford* v. *Blandford*.

It seems to me, therefore, that this is not a proceeding by a party grieved, nor does it come within 31 Eliz. c. 5, it not being an action qui tam by an informer for his own benefit and for the benefit of some other person on whose behalf he is suing. I may add that in the view I take there was no necessity in this case to make an affidavit that the cause of action arose within a year. It was not in fact made, and there was no application to set aside the proceedings on that ground, and, in my opinion, it was properly not made. I think under these circumstances

(1) 4 Burr. 2018.

(2) Law Rep. 1 Ex. 152.

the judgment must be reversed, and that our judgment should be in favour of the present appellants.

BAGGALLAY, L.J. I am of the same opinion. The short question involved in this appeal is, as put by Mr. Wills on the argument in the Queen's Bench Division, whether the Goldsmiths' Company in London are suing for penalties under 7 & 8 Vict. c. 22, s. 3, as "parties grieved" within 3 & 4 Wm. 4, c. 42.

By 3 & 4 Wm. 4, c. 42, s. 3, the period within which parties must commence their actions for penalties, if they are parties grieved, is limited to two years. The judges in the Queen's Bench Division were of opinion that the Goldsmiths' Company in London were parties grieved within the meaning of that Act.

Now I am unable to arrive at that conclusion, and for this reason, the law affecting the subject-matter of 7 & 8 Vict. c. 22, is not defined and enacted by that Act alone, but is made up of that Act and 12 Geo. 2, c. 26, and I am of opinion that they must be read together, omitting of course from the Act of Geo. 2 those clauses which have been since repealed. In the 3rd section of 12 Geo. 2, c. 26, we have an actual indication that "the party grieved" with reference to the subject-matter of the statute is a distinct person from the company, because that 3rd section enacts that "if any shopkeeper or other person trading or dealing in gold or silver wares, not being the maker or worker thereof, shall happen to export, sell, or expose to sale any gold or silver wares, worse than the respective standards, and shall within fourteen days next after notice of the coarseness thereof to him or her given, discover and make known to the party aggrieved, or to the master wardens or clerk of any of the companies of goldsmiths belonging to the place or district, &c." No doubt it has reference to a different offence from that with which the party is charged in this particular action, but a distinction is very clearly drawn between the party grieved by the Act complained of and the Goldsmiths' Company. I think it is therefore impossible to consider the Goldsmiths' Company in the present action as "parties grieved."

With reference to the further suggestion, that if the company are not parties grieved and so restricted to the limitation of the two years within which to bring their action by 3 & 4 Wm. 4, c. 42, they are limited to one year by 31 Eliz. c. 5. Now that statute of Elizabeth first limits the action of the Queen to two years, and then all qui tam actions to one year, and, as the Lord Justice has pointed out, very shortly after the Act it was held that it did not extend to the action by a common informer who was not suing qui tam. That seems to have been dissented from in another case, and in the more recent case of *Dyer* v. *Best* (1) the Court of Exchequer held that 31 Eliz. c. 5, extends to a common informer, although he is not suing in a qui tam action. I must confess there appears to me a great deal of force in the reasons given in the judgment in *Dyer* v. *Best* (1) in support of what was there held; but assuming that to be the law, it appears to me impossible to say that the Goldsmiths' Company are in the position of common informers. The case of a common informer can only apply where any person can sue; but here there is only the specified class mentioned in the Act who can sue, namely, the several goldsmiths' companies there described.

For these reasons I am of opinion that the Goldsmiths' Company are not only not within the limitation imposed by 3 & 4 Wm. 4, c. 42, but also not within that declared by 31 Eliz. c. 5.

LUSH, L.J. I am glad that the question has been so fully argued, because I confess that otherwise I should not have been able to have so clear a view as I now possess of the bearing of the particular statutes upon this case. Having had that advantage, I have now come to the clear conclusion that the judgment of the Court below cannot be upheld.

It has not been seriously contended, nor in my opinion could it be, that the limitation of one year is applicable to the present case. That limitation is only applicable to penalties which are given to any one of the public who sues for the same. That is not the case here. The penalty can only here be recovered by one of the companies mentioned in the statute, and it cannot therefore be contended that the case is one which is governed by the limitation of one year. Then is it governed by the limitation of two years? That is applicable only to parties grieved, and therefore if the company of goldsmiths are not suing as parties grieved, then they are not bound by the limitation of two years. Whether there is any other limitation or not is immaterial, though as at present advised I am inclined to think the case is within that part of 3 & 4 Wm. 4, c. 42, s. 3, which limits the time to twenty years; as to that I need give no opinion; it is not before us, and is utterly immaterial; for if the company are not limited to two years this action is in time. That brings us to the question whether the company are suing as parties grieved. Now, s. 3 of 7 & 8 Vict. c. 22, does not call them parties grieved or say anything about it, and therefore if they are within the limitation as parties grieved, they must be parties actually grieved, that is, parties who have sustained some damage by reason of the act done for which the penalty is fixed. That is the clear meaning of the expression "party grieved," for it is not a legal term; but a term in popular language, and the party must be one who already has a cause of action as soon as the act has been committed. I may mention that in *Merrick* v. *The Hundred of Ossulston* (1) it is stated "the Court held that where an Act of Parliament only gives a remedy to the party grieved, that is not to be considered as a penal action." Various instances are given in the books of actions by "parties grieved;" debt, for example, for not setting out tithes; there is a penalty for that; that is a clergyman's grievance; debt on an escape; there the creditors are grieved; debt for a copyhold fine; there the manor is grieved; and debt against a sheriff for extortion; there the party upon whom the extortion has been effected is grieved; and there are other examples in the books. I take it to be clear law that the party grieved must be a person who has sustained a legal loss or liability by an act done in respect of which the penalty is given. Now are the company in that position? The penalty is inflicted upon every dealer in gold or silver wares who sells, or exposes for sale, or has in his possession without lawful excuse, any wares of gold or silver having thereupon any forged or counterfeit mark; and the penalty may be sued for and recovered by any of the several companies mentioned in the Act.

---

(1) Law Rep. 1 Ex. 152.

---

(1) Cases temp. Hardwicke, 412.

1881

ROBINSON
v.
CURREY.

Lush, L.J.

Now, what legal injury has either of these goldsmiths' companies sustained by a man having in his possession or selling a lot of gold or silver plate stamped with a counterfeit mark? The person who buys any such ware in the belief that he is buying an article stamped with a genuine mark is the party grieved, but no penalty is given to such a man at all, and he is left to his action at common law for any amount of injury he may sustain. In no sense can it be said that these goldsmith companies are grieved by the act of selling, which is the act in respect of which this penalty is sought to be enforced. It seems to me that the whole scheme of the legislature is designed for the protection of the public. As early as the reign of Edward I. Acts were passed for the protection of the public against having gold and silver plate sold short of the mean standard, and subsequent Acts were passed imposing a public duty upon these goldsmiths' companies to protect the public, by requiring them to assay gold and silver plate, and to put their stamp upon them in order to authenticate the quality of the metal, and to prove that it contains a sufficient quantity of gold or silver up to the required standard. The 7 & 8 Vict. c. 22, makes it a felony if any person forges, counterfeits, or utter, knowing the same to be forged, or counterfeit, any die or other instrument used by the goldsmiths' companies for marking gold or silver wares, and every person who marks with such forged or counterfeit die, or who utters the same, knowing it to be forged or counterfeit, or who has in his possession any forged or counterfeit die of which he cannot give a lawful excuse, is liable to criminal proceedings. In that respect this Act is much more severe than the earlier Acts were.

Then there is the third section, the section in question, which imposes a penalty of 10*l.* upon every dealer in gold or silver ware who shall sell the same with forged marks. The sum of 10*l.* is very much like a summary infliction given by statutes to sanitary and other public bodies, with the object of enforcing the law for the benefit of the public. It is in that character this penalty is given to these different goldsmiths' companies, and that appears to me to be the fair and true meaning of this section. I do not think it is immaterial to observe, as my Brother Baggallay has pointed out, that in the statute of Geo. II. there is a distinction made between a party grieved, that is, a person who has been imposed upon by buying articles under the standard of the company and the companies who are to sue for the penalty, showing clearly that the companies are not considered by that Act to be the parties grieved. That portion of that statute is still in existence, and the two Acts together form a code for the better protection of the public in this particular matter. From beginning to end the matter is dealt with for the better protection of the public, and not with reference to the interest of the several goldsmiths' companies who are charged with the duty of enforcing this penalty.

I am therefore of opinion that the judgment of the Divisional Court is erroneous and must be reversed.

Judgment reversed.

Solicitors for plaintiff: *Prideaux & Sons.*
Solicitors for defendant: *Ruddle & Brown.*

W. P.

McLAREN *v.* HOME.

May 3.

Election Petition—Witnesses—Expenses—Certificate of Registrar—Taxation by Master—31 & 32 *Vict.* c. 125, *ss.* 34, 41 *and Rules.*

Although the amount of the reasonable expenses to be paid to any witness in an election petition may, under 31 & 32 Vict. c. 125 (the Parliamentary Elections Act, 1868), s. 34 and r. 5 of its Additional General Rules, January, 1875, be ascertained and certified by the registrar, his certificate is not conclusive of the amount as between the petitioner and respondent, but it is, as part of the general costs of the petition, subject under s. 41 to taxation by a master who must exercise his discretion on the expenses certified.

MOTION referred from chambers to the Court for an order to a master to review his taxation of the respondent's bill of costs in respect of a parliamentary election petition.

The petition was tried at Berwick-on-Tweed, and occupied two days. Judgment was given for the respondent, with costs. The expenses of the respondent's witnesses were allowed by a certificate of the registrar.

On the taxation of the general costs of the respondent before a master, he taxed, inter alia, the allowance to the witnesses, and only allowed on the scale indorsed on the bill of 18*l.* 15*s.* for the witnesses who were actually called and examined, and a further single sum of 26*l.* 5*s.*, making a total sum of 45*l.* as an allowance for all witnesses in attendance on behalf of the respondent.

Objections were made to the taxation, and answers thereto given by the master. After objections to the taxation of certain allowances of fees to counsel, it was objected as follows: "Having regard to ss. 3 and 34 of 31 & 32 Vict. c. 125 and r. 5 of the Additional General Rules of the 27th of January, 1875, and also to the judgment in *Trench* v. *Nolan* (1), it is submitted that the taxing master has no power to review or rescind the amount of the certificate of the registrar given in this case, and that instead of the amount of 45*l.* inserted in the bill of costs by the master the amount of the registrar's certificate of the 12th of March, 1881, should be inserted in the said bill of costs."

It was also submitted that if the taxing master was at liberty to tax the costs of the witnesses after the registrar had so certified as aforesaid, the costs of each witness ought to have been separately taxed and not merged in one sum of 45*l.*, and that in any case the sum of 45*l.* was, having regard to the before-mentioned judgment and special allowances and general provisions and to the time occupied by the trial, inadequate, and ought to be increased.

The master gave his opinion that s. 34 only applied to the allowance to be made to the witnesses as against the party who obtained their attendance, and, after referring to s. 34 and the substitution for r. 40 of r. 5 of the Additional Rules of the 27th of January, 1875, he further answered—"In the taxation which the registrar has in fact made he does not appear to have acted on any recognized principle or allowable scale. According to the scale adopted by s. 34 of the Act 1*l.* 1*s.* per diem is the maximum allowance to be made to any witness residing in the town in which the trial took place. This trial lasted two days only, the second day being a long one. The registrar has allowed

---

(1) 7 Ir. C. L. Rep. 445.

6*l.* 6*s.* to one such witness, 4*l.* 4*s.* to another, 3*l.* 3*s.* to another, and to several others amounts, differing equally obviously, though less in degree from the allowances sanctioned by the only scale in existence. I have arrived at the 45*l.* by allowing the entire scale expense of all witnesses who were examined, and the expense of having about forty more present till the trial was finished, including all who came from a distance. A very large majority of the witnesses reside close to the place of trial, and I have allowed for the attendance of two clerks to fetch more whenever the numbers present should be so reduced as to make it prudent to do so."

Macaskie, in support of the motion. The amount of the bill as taxed should be increased. By 31 & 32 Vict. c. 125, s. 34, "The reasonable expenses incurred by any person in appearing to give evidence at the trial of an election petition under this Act, according to the scale allowed to witnesses on the trial of civil actions at the assizes, may be allowed to such person by a certificate under the hand of the judge or of the prescribed officer, and such expenses, if the witness was called and examined by the judge, shall be deemed part of the expenses of providing a Court, and in other cases shall be deemed to be costs of the petition." "Prescribed" officer means "prescribed by the Rules of Court": s. 3. The General Rules of 1868, r. 40, provided that the reasonable costs of any witness should be ascertained by the registrar of the Court, but Additional General Rules of January, 1875, r. 5, revoked r. 40, and ordered that the amount to be paid to any witness, whose expenses shall be allowed by the judge, shall be ascertained and certified by the registrar.

The general costs are, no doubt, to be taxed by the master: 31 & 32 Vict. c. 41. But as to the witnesses' costs he must follow the certificate of the registrar. The allowance of the registrar is final between the two parties, and the witness whose expenses are disallowed by the registrar must sue the party who summoned him. That the registrar has power to tax as between the parties to the petition is evident from the *Harwich Case*. (1) "Even as between party and party a liberal scale of costs is to be allowed on taxation," per Bovill, C.J.: *Hill* v. *Peel.* (1) The master should allow for all witnesses bonâ fide summoned on the trial, whether certified for or not: *Trench* v. *Nolan* (2); Scott on Costs, p. 326. And he should have allowed the expenses of each separately instead of a lump sum. The master has, no doubt, considered himself bound by the scale to which he refers in his answer, and that he could not allow even to professional witnesses more than a guinea a day. But that scale is repealed by the 8th rule of the Additional Rules of 1875: *Turnbull* v. *Janson.* (3) This motion, if dismissed, should be at least dismissed without costs: *Bartholomew* v. *Carter.* (4)

---

(1) 3 O'M. & H. part ii. p. 71.

M'Clymont, for the petitioner, was not heard.

LORD COLERIDGE, C.J. I am of opinion that we cannot interfere with the taxation of the master. Some important points have been raised on which it is as well that I should state my present impression, and, of course, if further argument in another case should lead me to alter my view I should not hesitate to do so. My present impression on the statute before me is that the reasonable expenses of witnesses on the petition, as between the persons who summon them and themselves, are to be ascertained by the registrar. It may be—I do not say it is so here—that a petitioner or respondent, as the case may be, might summon a number of wholly unnecessary witnesses for the purpose of inflicting grievous costs on the other side if he succeeded, he being a rich man indifferent to expenses to himself, and it would be hard as between the witnesses and the person summoning them if they did not get their expenses. So it is right that they should have their reasonable expenses paid by the persons who summoned them, and their reasonable expenses are by the terms of the Act of Parliament to be ascertained by the registrar, and the Act proceeds to say that the reasonable expenses so ascertained shall be costs in the petition. That is to say, shall be matters to be dealt with as costs. It does not say they are not to be taxed, or are to be paid by the losing party, but merely that they are to be paid on the certificate of the registrar, that, I take it for granted, is in the first instance by the parties who summoned them. Then there is a further provision that costs are to be taxed by the officer of the Court, and taxed as costs of a civil action are taxed by the proper officer or taxing master—in this case by the taxing master. He is to tax the costs, part of which costs are made up of the reasonable expenses—reasonable as between the witnesses and the party who summoned them—ascertained in the manner prescribed by the former section, but there is nothing to shew that because the registrar has ascertained the sum to be a reasonable sum for, I will say, even an unnecessary witness as between the member and witness, the costs of that witness are to be inflicted on the opposite party. I am thankful to see from the plain language of the statute that the legislature never intended anything so unjust. The costs are to be taxed, and the master has taxed them, disallowing certain sums which the registrar has found reasonable as between the party summoning the witness and the witness. Several objections have been taken to the disallowances. The objection most strongly urged is that the master had no power to disallow certain sums which the registrar found reasonable as between the party summoning and the witness. I think the master had such power. Then it is said that he ought to have examined the individual expenses of the particular witnesses, and have shewn which witnesses he allowed, and how much he allowed to each, instead of stating a sum total allowance of 45*l.* Until the words of the master in answering it are carefully looked at, the objection might seem to have force, because he is bound to exercise his discretion as to the individual witnesses. But he evidently has done so. I understand the facts to be these: The petition was tried at Berwick, and lasted two days. Very few witnesses were examined, although a large number were subpœnaed, and the respondent attempts to charge as a matter of course on the losing party the total expenses for two or three days of every witness, who, if the case had gone on, might have been sent for and might have been material. The master says, in effect, that that would be unjust, and that he has allowed a total of the scale expenses of every witness examined and every one who could not be sent for on the spur of the moment, and whom, therefore, it was reasonable to have in attendance in case he should be wanted, and the master allowed for a certain number besides, so as not to keep the Court waiting for witnesses, but has not allowed for the constant presence of a number of witnesses who might be sent for in a few minutes, and who were not examined. The expenses of two clerks in attendance to fetch the witnesses and keep up the number to forty, to prevent the Court being delayed, were, however, allowed. So that the master's answer, when taken altogether, shews that he has, under the circumstances, exercised an individual judgment as to the witnesses, although not indeed on each individual, and his judgment seems fair. With respect to the judgment of Lush, J., in the *Harwich Case* (1), I am not satisfied that the learned judge meant to say that the registrar's certificate was to ascertain between the parties without appeal what witnesses were material.

---

(1) Law Rep. 5 C. P. 172, at p. 179.

(2) 7 Ir. C. L. Rep. 445.

(3) 3 C. P. D. 264.

(4) 4 Man. & G. 612.

I now come to the objection which causes me to discharge this rule without costs, for Mr. Macaskie has cited a case decided by two eminent judges, and strongly in support of his contention. Professional witnesses were allowed by the registrar much more than a guinea a day. The master has taxed off all the allowances beyond a guinea a day. In *Turnbull* v. *Janson* (2) the Common Pleas Division seem to have thought under circumstances very similar to these that the 8th rule of the Additional Rules of 1875, which provides that "such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses are to be allowed," was intended to repeal the scale of 1853, which prescribed that no more than a guinea a day might be allowed to professional witnesses. On the ground that the master in that case had not exercised his judgment, the Court sent the bill of costs back to him for review. It is unnecessary now to deal with that case, or to refer to the minute and careful criticism of r. 8 by Grove, J., in the earlier case of *Mackley* v. *Chillingworth.* (3) There are, however, in *Turnbull* v. *Janson* (2) expressions which warranted Mr. Macaskie in applying to us on an important point of his motion, and, therefore, I think it should be discharged without costs.

---

(1) 3 O'M. & H. part ii. p. 71.

(2) 3 C. P. D. 264.

(3) 2 C. P. D. 273.

Field, J. I come to the same conclusion. The case has been ably argued for the appellant, and no doubt the points raised are not altogether free from difficulty. The first question is as to the true construction of 31 & 32 Vict. c. 125, s. 34, and the Rules and Orders made under it. Sect. 34 deals specifically with the subject of witnesses and was inserted to protect their interests, and renders it necessary to go to the local tribunal—the registrar. The section undoubtedly provides that there shall be an inquiry into the reasonable expenses incurred by the witnesses, and the language of the section is rather informal when it says that the reasonable expenses shall be deemed to be costs of the petition. Mr. Macaskie says that the costs must be ascertained in that way and be costs of the petition. But such construction would lead to injustice. The master has gone carefully into the matter, and has come to the conclusion that the words have not such a large meaning, and when in s. 41 I find that the costs are to be taxed, I think that the true and reasonable construction of s. 34 is the construction which the master has put upon it. Then it appears that the registrar has allowed to certain witnesses a sum beyond the scale. The learned counsel has argued with great force and with authority to support his view, that the master has felt himself limited by the scale, and that under the circumstances he was not so limited, and the Court would review his decision. If we found that he had felt himself bound by a scale by which he was not bound, we ought to review his decision, but his careful answer shews that he has gone thoroughly into the matter and considered the short time of the trial and the fact of many witnesses living in the town. Then there is the question whether he has taken Rule 8 into consideration, and it is said that it has the effect of altering to some extent the scale. We must see what the scale was meant for. The scale was prepared with remarkable accuracy, and takes into consideration every degree in life, gentlemen, esquires, bankers, merchants, &c., and no doubt a careful average has been made extending not to one particular case, but to all. It does sub-

1881

McLAREN v. HOME.

stantial justice, and gives reasonable remuneration to witnesses. Then was it intended by rule 8 of Rules of the Supreme Court (Costs) to interfere with that scale? The Rule is not so precise in terms as could be wished, but when I found another distinct Rule, r. 28, to the effect that the rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice . . . relating to costs and the taxation of costs existing prior to the commencement of the Act shall, in so far as they are not inconsistent with the Act, and the Rules of Court in pursuance thereof, remain in force and be applicable to costs of the same or analogous proceedings, unquestionably if this case had come before me in the first instance, I should have much hesitated before arriving at the conclusion that the words of r. 8 were intended to interfere with the old scale. The decision in *Turnbull* v. *Janson* (1) is, no doubt, to the effect on which Mr. Macaskie relies, and, if the facts in this case were the same, we might have been bound to apply it. But they are not so, and I think the rule should be discharged without costs for the reasons stated.

Motion dismissed without costs.

Solicitors for petitioner: *Pyke & Minchin.*
Solicitors for respondent: *Shum, Crossman, & Co.*

---

(1) 3 C. P. D. 264.

J. R.

THE RYHOPE COAL COMPANY, LIMITED, APPELLANTS; FOYER, RESPONDENT.

1881
March 19.

Revenue—Income Tax—Coal Mines—Partnership—Incorporation of—Succession—Diminution of Profits from Extraordinary Depression of Trade—"Specific Cause"—5 *&* 6 *Vict. c.* 35, *Scheds. A and D—Rules*—29 *Vict. c.* 36, *s.* 8.

A partnership, after working certain coal mines for more than five years, was on the 21st of December, 1875, incorporated as a limited company, and sold to the company the assets, subject to the liabilities, of the partnership. The partners became holders of all the shares in the limited company according to their interests. After the 3rd of August, 1876, changes took place in the shareholders. The company, being assessed by the Income Tax Commissioners to the income tax under 5 & 6 Vict. c. 35, Sched. D, for the year ending the 5th of April, 1877, on an average of the five preceding years, appealed, and contended that they were only liable to pay on a computation for one year on the average of the profits from the 21st of December, 1875, the date of the incorporation.

The Commissioners stated a case in which they found that "the profits and gains of the appellants' business had fallen short since the 21st of December, 1875, from the following specific causes, viz., the extraordinary depression in the iron and coal trades whereby the appellants were unable to sell either so large a quantity of their coals as they had formerly been enabled to do, or to obtain anything like so good a price for such coals." Figures shewing that the annual profits had fallen short by one-half were set out:—

Held, That Sched. A, No. 4 Rules, clause 6, which prescribes that if it shall appear that the account required by the rules "cannot be made out by reason of the possession or interest of the party to be charged thereon having commenced within the time for which the account is directed to be made out, the profits of one year shall be estimated in proportion to the profits received within the time elapsed since the commencement of such possession or interest," did not apply;

That the business was a "trade . . . adventure or concern," within Sched. D, rule 1 of the rules for ascertaining the duties to be charged in respect thereof, and was not within the terms of the proviso "set up and commenced" within the period of three years;

That the company was a new association carrying on an old concern; and had "succeeded" to it within clause 4 of the third set of rules in Sched. D, but that, since such succession, the profits had fallen short from a "specific cause" within the exception in that clause;

And that the rule of the sixth case in Sched. D applied, and under it the computation should be made "on the amount of the full value of the profits and gains received annually," i.e. for the current year.

THE appellant company by their secretary appealed to Commissioners of Income Tax against an assessment under Schedule D of the Income Tax Acts on the sum of 77,083*l.*, in respect of the profits of the appellant company for the year 1876, ending the 5th of April, 1877, the same being assessed on an average of the five preceding years. It being contended on behalf of the appellant company that it was only liable to pay on the computation of one year on the average of profits from the date of its incorporation, the Commissioners stated the following:

CASE.

The Ryhope Coal Company was an ordinary partnership, formed on the 1st of January, 1856 for the purpose of working certain mines in the county of Durham, which they continued to do up to the 21st of December, 1875.

On the 21st of December, 1875, the then partners of the Ryhope Coal Company, by contract in writing, sold to the Ryhope Coal Company, Limited, the assets (subject to the liabilities) of the Ryhope Coal Company for the sum of 602,400*l.*

The Ryhope Coal Company, Limited, was incorporated on the 21st of December, 1875, for the purpose of taking over and carrying on the business of the Ryhope Coal Company, with a capital of 652,600*l.*, divided into 502 shares of 1300*l.* each. The purchase-money was to be paid by issuing to the partners of the Ryhope Coal Company the whole of the 502 shares (on each of which 1200*l.* was to be written up as paid), 502 × 1200, making the purchase-money 602,400*l.*, in proportion to their shares in the Ryhope Coal Company.

The partners in the Ryhope Coal Company became holders of all the shares in the Ryhope Coal Company, Limited, according to their interests in the Ryhope Coal Company, and the only change effected was that the old partners were incorporated as a limited company, in which they held the same interests as in the old company, but divided into partially paid-up shares. The working of the mines never ceased.

Since the 3rd of August, 1876, various changes had taken place in the shareholders of the Ryhope Coal Company, Limited, the said shares having been bought and sold.

It was agreed that should the Court decide that the company was liable to pay on an average of five years the amount assessed should stand.

Under paragraph 2, No. III. of Schedule A of 5 & 6 Vict. c. 35, the annual value of mines of coal, &c., is to be understood to be the full amount of profits for one year on an average of the five preceding years, subject to the provisions concerning mines contained in that Act.

One of such provisions is that the duty is "to be charged on the person, corporation, company, or society of persons, whether corporate or not corporate, carrying on the concern, or on their respective agents, treasurers, or other officers having the direction or management thereof, or being in the receipt of the profits thereof, on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value either between the different persons or members of the corporation, company, or society engaged in the concern, or to the owner of the soil or property, or to any creditor or other person whatever having a claim on or out of the said profits."

The appellants admitted that their mines had not from some unavoidable cause decreased and were not decreasing in the annual value thereof, and that consequently they could not and did not claim any exceptional circumstances to entitle them to be charged on a different basis from other mines, and the Commissioners thereupon decided that rule 5 of No. IV. Schedule A of 5 & 6 Vict. c. 35, did not apply in this case.

By s. 8 of 29 Vict. c. 36, it is enacted that "the several and respective concerns described in No. III. of Schedule A of the said Act passed in the 5th and 6th years of her Majesty's reign, c. 35, shall be charged and assessed to the duties hereby granted" (being the income tax duties) "in the manner in the said No. III. mentioned according to the rules prescribed by Schedule D of the said Act, so far as such rules are consistent with the said No. III."

The first case under Schedule D of 5 & 6 Vict. c. 35, comprises the duties chargeable in respect of any trade, manufacture, adventure, or concern in the nature of trade; and mines will therefore come under that case.

12. By paragraph 1 of the rules of such first case "The duty . . . shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years. . .: provided always that in cases where the trade, manufacture, adventure, or

concern shall have been set up and commenced within the said period of three years, the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same." This paragraph will apply to mines excepting that the average will be five years instead of three.

13. By paragraph 4 of the rules applying to both cases under Schedule D of the said Act it is enacted as follows: "If amongst any persons engaged in any trade, manufacture, adventure, or concern, or in any profession in partnership together, any change shall take place in any such partnership, either by death, or dissolution of partnership as to all or any of the partners, or by admitting any other partner therein, before the time of making the assessment, or within the period for which the assessment ought to be made under this Act, or if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein-mentioned, notwithstanding such change therein or succession to such business as aforesaid. . ."

The Commissioners were of opinion that the business of the Ryhope Coal Company, Limited, was not a trade, manufacture, adventure, or concern set up and commenced within the period of five years within the meaning of the proviso of the Act cited in paragraph 12 of the case. And further, having regard to the fact that the Ryhope Coal Company, Limited, was formed to carry on the business of the Ryhope Coal Company, and consisted of identically the same partners as the Ryhope Coal Company consisted of, and to the fact that such partners had identically the same interest in the new company as in the old, they were of opinion that the Ryhope Coal Company, Limited, was really and in fact but a continuation of the Ryhope Coal Company under another name and was not entitled to the benefit of the said proviso, and was therefore liable to be assessed on the average profits of five years.

The Commissioners were also of opinion that, as the mines in question had been constantly working for more than five years, such mines were liable under the Income Tax Acts to be assessed on the profits on the average of five years irrespective of the question of ownership.

The Commissioners were also of opinion, apart from the fact that the Ryhope Coal Company, Limited, consisted of the same partners in the same interests as the Ryhope Coal Company, and supposing such Ryhope Coal Company, Limited, to be a company formed of altogether different persons from the Ryhope Coal Company, that it came within the meaning of the rule of the Act cited in paragraph 13 of this case as having succeeded to a trade, manufacture, adventure, or concern and was therefore liable to an assessment on the average of the five preceding years.

The assessment on the average was accordingly confirmed, whereupon the appellants declared their dissatisfaction with the determination as being erroneous in point of law, and duly required the said Commissioners by notice in writing addressed to their clerk to state and sign a case for the opinion of the Court, according to the statute 37 Vict. c. 16, s. 9, which the Commissioners stated and signed accordingly.

17*a*. The profits and gains of the appellants' business had fallen short since the 21st of December, 1875, from the following specific causes, viz.:—

17*b*. The extraordinary depression in the iron and coal trades whereby the appellants were unable to sell either so large a quantity of their coals as they had formerly been enabled to do, or to obtain anything like so good a price for such coals. The following were the actual profits and gains of the appellants' business since the 21st of December, 1875, viz.:—

Profits and gains of the appellants' business from the 21st of December, 1875, to 31st of December, 1876.	27,487*l*. 7*s*. 9*d*.

whereas the profits and gains of the Ryhope Coal Company prior to the formation of the Ryhope Coal Company, Limited, from the 31st of December, 1874, to the 21st of December, 1875, were 58,889*l*. 16*s*. 9*d*.

The question for the opinion of the Court was whether the

1881

RYHOPE COAL COMPANY v. FOYER.

Ryhope Coal Company, Limited, was liable to pay duty in respect of its profits from the mines carried on by it on an average of the five preceding years, or whether, as was contended by the company, it was only liable to pay on a computation for one year on the average of the profits from its incorporation on the 21st of December, 1875. (1)

Sir J. Herschell, S.G., and *A. L. Smith*, for the appellants.

Sir Henry James, A.G., and *Dicey*, for the respondent.

The arguments sufficiently appear in the judgments.

Cur. adv. vult.

March 19. GROVE, J. This case was an appeal against an income tax assessment by the Commissioners, whereby the appellants were assessed for a coal mine, and the case involved the consideration of several sections of the statute under which the appellants claimed to be assessed upon one year's profits instead of being assessed upon an average of five years or three years, which periods are mentioned in different parts of the schedules of the Act of 5 & 6 Vict. c. 35.

The property (or the business, as I should rather say), had belonged to an ordinary partnership association, and in December, 1875, the persons who then constituted the partnership converted themselves into a limited liability company. The persons remained the same, the mining concern remained the same, and the shares were allotted to the persons in the proportion in which their previous partnership interests were divided. Several questions arose as to whether this was the same company carrying on the same business, or whether it was a new adventure or concern set up under different circumstances, and therefore came within one of the sections of the statute to which I shall presently advert, and whether it "succeeded" the other association within any section of the statute.

By Sched. (A) Rule III.: "The annual value of all the properties hereinafter described shall be understood to be the full

---

(1) At the first hearing of the case before Kelly, C.B., and Pollock, B., it was sent back for amendment to the Commissioners, who added pars. 17*a*, *b*.

1881

Ryhope Coal Company v. Foyer.

Grove, J.

amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited." And the second class of properties is "Of mines of coal, ... and other mines, on an average of the five preceding years, subject to the provisions concerning mines contained in this Act."

On behalf of the Crown for the Commissioners it was contended that this assessment should be made, and it was indeed made, on an average of the five preceding years, and not, as the appellants contended, of one year. If the company had been assessed upon five they would have had an average of five years of good profits, which would have made them pay a much higher income tax than if they had been assessed upon the one year in which they made so much less profits.

By Rule No. IV. clause 6: "If, in estimating the value of any of the properties enumerated in No. II. or No. III. of this schedule as before-mentioned, it shall appear that the account required by the said rules cannot be made out by reason of the possession or interest of the party to be charged thereon having commenced within the time for which the account is directed to be made out, the profits of one year shall be estimated in proportion to the profits received within the time elapsed since the commencement of such possession or interest."

The appellants' first contention was that they came within that clause. The answer made was, that by the 29 Vict. c. 36, "the several and respective concerns described in No. III. of Schedule A of the said Act" the 5 & 6 Vict. c. 35 "shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by Schedule D of the said Act, so far as such rules are consistent with the said No. III." In Schedule D we find rules for ascertaining the duties to be charged in respect of any such "concern" as that in question. Rule 1, is that "the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years" ending on such a day of the year, &c.; "provided always, that in cases where the trade, manufacture, adventure, or concern shall have been set up and commenced within the said period of three years, the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same." Therefore, by the effect of 29 Vict. c. 36, if it throws the case on Schedule D the period of three years is substituted for five years, unless three years be not consistent with No. 3, in which case I presume that the rules of No. 3 would remain, but I will say a word about that presently.

Whether one Act of Parliament is consistent with another, is somewhat a question of degree. There may be absolute inconsistency, as when something is positively enjoined by one Act and as positively forbidden in another; but in construing affirmative words, it is difficult to say what canon of construction should be applied to the phrases "as far as these words are consistent with," "this Act repeals so much of an Act as is inconsistent with it, or "this Act shall be construed so far as it is consistent with" another; and it certainly is an illustration of the difficulty that in this particular case the judges of Scotland in the Court of Session in *Inland Revenue* v. *Fairleigh* (1) construe these two clauses as being consistent, while the learned Attorney General and Solicitor General here, although opposed in the case, construe them as being inconsistent, my Brother Lindley construes them as partially consistent, and if I were obliged to decide the matter, I should take rather a different view from my Brother Lindley. So far we have four different views of the interpretation and possibly might have others. Such words are easily written, but whether they conduce to clearness and the facility of administering justice, may be perhaps open to argument. However, from the view I take, it really does not signify, for whether we go upon No. 3, interpolating into it, as the appellants contend we ought to, the 6th head of No. 4, or whether we take Rule I. in Schedule D, and read with it the proviso, or whether we accept the rule No. 3 and consider that it is inconsistent with the five year rule, but that the proviso on that does not fall—all of which views are open to argument—it appears to me the result is the same; because I am of opinion that the appellants do not come within the 6th head of No. 4, Schedule A, or that they come within the 1st rule of

---

(1) 16 Scottish Law Rep. 189.

Schedule D. If that be the case quâcunque viâ, it is immaterial to decide whether the one rule is repealed by the other, or is consistent or inconsistent, or how far it is inconsistent with the other.

Let me now return to Rule No. 4 clause 6. The Attorney General contended that the fact that the account required by the rules "cannot be made out," is a matter to be proved by evidence, and I think he contended that the onus rests on the party seeking the exemption to prove that he had not the means and the power of making out the five years' account by reason of his possession or interest having commenced within the time for which the account is directed to be made out.

It was contended on the other side that it is to be assumed that the account cannot be made out "by reason of the possession or interest having commenced within the time for which the account is directed to be made out." I do not go the length of the Attorney General in saying this is to be always decided as a question of fact, but I think we must attach some meaning to those words "cannot be made out," and I am of opinion that in this case the circumstances and facts relied on to shew that the account cannot be made out by reason of the concern having been changed all go the other way, and shew that nothing is more easy than to make it out. It is the same concern; the individuals are the same; the proportionate interests are the same; the whole property is the same; and therefore if we are to make any presumption in the case, we must presume that the appellants were as well able to make out any account after they were themselves a limited company as they were when it was a partnership. There is neither evidence nor presumption that the five years' account could not just as well be made out the day or six months after the company was called by another name as before; they were the same parties, and if they allotted any of the shares it would be no more than if the original company had changed one of the partners or the interests of one of the partners. They had the accounts and books and necessarily could not go on without them, and therefore there is no reason at all why the accounts should not be made out. I am of opinion therefore, the company are not exempted within clause 6. Then as to Schedule D, rule 1, it was contended that the "trade, manufacture, adventure, or concern" was "set up and commenced" within the period of three years. The appellants contended that the company turning themselves from an ordinary partnership into a limited company, made it a new trade, manufacture, adventure, or concern, the Crown contending that the words "trade, manufacture, adventure, or concern," applied to the undertaking itself, and not to the change of partnership in the individuals carrying on the undertaking. I am of opinion that that is the proper construction. "Trade," clearly cannot mean the parties trading. Then as to the business itself. Here it was that of a mine, which possibly might be within the word "trade." But "concern," is the widest of the words used, and I think that this was a mining "concern." The word "concern," in such popular phrases as "a going concern," "a promising concern," "a losing concern," or "a rotten concern," is applied to the business itself, and in the subsequent statute, 29 Vict. c. 36, s. 8, we find the word "concern," used in that sense thus: "the several and respective concerns described in No. 3, of Schedule A," of 5 & 6 Vict. c. 35, shall be charged with the duties hereby granted. What are the "concerns" described in No. 3? Amongst others are "mines of coal," so that in the construction of those statutes which interlock with each other, this very undertaking is called a "concern;" therefore the Attorney-General's interpretation of that word is right, and the proviso in rule 1 of Schedule D, does not apply to a mere change in the individuals constituting the firm or company, but applies to the setting-up of an adventure or concern; and I think that the words "set-up," and "commenced," apply strictly to that, and it cannot be said to be "set-up," or "commenced," because there is a change in the partnership carrying on identically the same adventure or concern. On this question I do not feel much doubt. It appears to me that the words "trade, manufacture, adventure, or concern," apply to the undertaking, and have no reference to the individuals who carry it on. I now come to the last ground upon which the appellants seek exemption. Schedule D contains under the heading "Rules," first, a set of four rules, next a set of three rules, and then a set of five rules, and on the fourth rule of this last set of five the appellants contended, either that they did not come within the earlier part of the rule—that contention of course would only serve them if they succeeded on the prior grounds to which I have referred—or, if they did come within it, then that they are also within the certain provisoes or exceptions of the clause at the end. The words of this rule are: "If amongst any persons engaged in any trade, manufacture, adventure, or concern"—which are the same four words used in the rule 1 above-mentioned, and support the construction I have put on that rule—"or in any profession in partnership together, any change shall take place"—not in the adventure or concern or the setting-up of an adventure or concern but—"in any such partnership, either by death or dissolution of partnership as to all or any of the partners, or by admitting any other partner therein, before the time of making the assessment or within the period for which the assessment ought to be made under this Act, or if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein-mentioned, notwithstanding such change therein or succession to such business as aforesaid;" now there I stop.

I am of opinion that the facts here were no other than that a change took place in the partnership. The words are not "as to one partner or more," but "as to all or any." It took place here as to "all." It is undoubtedly a change in a partnership, and a very important change, that it should be converted from an ordinary partnership into a limited liability company. I am of opinion that there was a change, and that this limited company did "succeed" to such profession, trade, manufacture, adventure, or concern; therefore they are brought within the portion of this clause to which I have referred.

Then comes the question, are they within the exception?

The exception is:—"unless such partner, or such person succeeding to such business as aforesaid, shall prove to the satisfaction of the respective Commissioners, that the profits and gains of such business have fallen short, or will fall short from some specific cause to be alleged to them" (that is to the commissioners) "since such change or succession took place, or by reason thereof."

It was contended on behalf of the appellants that the business did fall off, and fell off so that the profits became less than half the amount of the previous profits, from a specific cause, and the specific cause alleged was the extraordinary depression in the iron and coal trade, whereby the appellants were unable either to sell so large a quantity of their coal or at anything like so good a price as they had formerly been able to do. I expressed during the argument very considerable doubt whether the phrase "specific cause" could apply to the ordinary fluctuations of trade. I certainly do not adopt the arguments of the appellants here, and say, that "specific cause" means specified cause. I do not think that is the proper meaning of the word "specific," either in grammar or within this Act. A specific thing, and a specified thing are to my mind totally different; I think "specific cause" must be something capable of expression, but also something exceptional, it must not be the ordinary fluctuation incident to every business. The Scotch Court in the case which I have mentioned held that the depression of trade was a specific cause. I do not differ from them, in one sense I agree with them, except that I should put it thus, that depression of trade may be a specific cause, but is not necessarily a specific cause.

The specific cause must, I think, be something unusually exceptional and extraordinary, just as in those cases of damage done by floods, where the ordinary overflowing and annual flooding of the year is not considered an act of God and an exceptional thing, but a flood which does not occur for a century is so. But here there seems to have been an exceptional time, to use the words of the Commissioners: "An extraordinary depression in the iron and coal trades." I think "an extraordinary depression in the iron and coal trades" which reduces the profits of a concern to less than half its former profits, is properly called a "specific cause." The Commissioners say—"The profits and gains of the appellants' business have fallen short since the 21st of December, 1875, from the following specific cause, namely, the extraordinary depression in the iron and coal trades," and then they go on to state what I have already read. I think, therefore, the appellants come within the exception, and are entitled to the benefit of it. Then the question arises upon what principle is the duty to be assessed?

The Solicitor General contended that the period must necessarily be a year, he did not give any grounds for that, and I entertained some doubts about it at the time. I thought the Commissioners might perhaps exercise their discretion under s. 133, which gives them power to amend the assessments in certain particulars, but my Brother Lindley has observed a section in the Act which seems to meet the matter, and that is s. 100, the 6th case. "The duty to be charged in respect of any annual profits or gains not falling under any of the foregoing rules, and not charged by virtue of any other of the schedules contained in this Act. The nature of such profits or gains and the grounds on which the amount thereof shall have been computed, and the average taken thereon (if any), shall be stated to the Commissioners, and the computation shall be made either on the amount of the full value of the profits and gains received annually, or according to an average of such period greater or less than one year, as the case may require and as shall be directed by the said Commissioners; and such statement and computation shall be made to the best of the knowledge and of belief the person in receipt of the same or entitled thereto." The computation must either be on an average of years or the full value of the profits and gains received annually. Here the average of years is gone by reason of our judgment that the case comes within the proviso that I have read; therefore it appears to us that there is no other choice but that computation must be made of the gains for the current year (I suppose I must call it), that is, the year following the last assessment of the old firm up to the period of the next assessment of the new firm, and that view is confirmed by the words of No. 3 of Schedule A, which says:—"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year or the average amount for one year, of the profits received therefrom within the respective times herein limited." We are of opinion that such should be the principle of computation which the Commissioners should apply.

We think that as several points relied upon by the appellants have failed, and seeing, moreover, that they have amended the case, and got the beneficial result of the fair statement of the Commissioners added to the case, there should be no costs on either side.

LINDLEY, J. The question we have to decide here is the principle on which income tax ought to be assessed on profits made by the Ryhope Coal Company for the year ending the 5th of April, 1877, and how the income tax is to be assessed on this company for that year is the problem to be solved by us.

This company was incorporated and formed on the 21st of December, 1875, under the Companies Act of 1862, by persons who had for many years previously carried on and worked the colliery which the company was formed to continue to work and carry on. The Income Tax Commissioners have assessed the company upon the principle that the company is in substance, and for legal purposes, the same as the old partners. In my opinion, at starting, that cannot be right in point of law. A company incorporated under the Act of 1862 is for no legal purpose the same as the persons who have become a corporation with distinct rights and distinct liabilities, and whether the shares are bought by those who form it seems to me for that purpose utterly immaterial; and I think, therefore, the principle on which the Commissioners have proceeded from first to last in assessing this corporation of five, six, or seven old partners, is to be regarded as erroneous and fundamentally wrong. I treat it as a case in which the company were a corporation, and it is not right, as it strikes me, to inquire further and see how the capital was subscribed. Next, it seems to me impossible to hold that the business, the trade of a colliery concern, which the company was formed to carry on, was a new trade, or mine, or business, or concern, set up and commenced for the first time on the 21st of December, 1875. The view I take of the facts is this, the company "succeeds," and then succeeded to the trade, business, or colliery which was previously carried on. Having got thus far, we turn to the Acts of Parliament, my Brother Grove has been through them. We begin with the Act which imposes the income tax for the year in question, and that is substantially, as

I understand, not different from the Act of 1866. Of course it was not the same, but we have to construe that Act and the general Income Tax Act together and see what is the true principle to be applied.

The Income Tax Act of 1842 grants income tax by imposition on land, trades, and professions according to a certain scheme, and the scheme is ascertained by studying the schedules A, B, C, and D. The schedule A comprises lands, tenements, and hereditaments in respect of the property, schedule B is in respect of the occupation. Then we come to dividends, annuities, and so on, and to schedule D, comprising professions, and trades, and employments, and so forth. Under the Act of 1842 this mine would be in schedule A, that is to say, the schedule preceded by the operative words of s. 60, and the particular part of schedule A, which related to mines, is No. 3, running thus:—"Rules for estimating lands, tenements, hereditaments, or heritages hereinafter mentioned, which are not to be charged according to the preceding general rule." "The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year of the profits received therefrom within the respective times herein limited." Then for mines we have the average of five preceding years. Therefore it comes to this, that the annual value of mines is to be understood to be the full amount for one year, or the average amount for one year, of the profits received for five years. So far that is plain. Then, following out the same scheme, we come to No. 4, which contains rules and regulations respecting the duties previously mentioned, including the duties applicable to mines. I pass now to 29 Vict. c. 36, s. 8, the Act which modified the general income tax as regards mines. The Income Tax Act of 1842 did not treat mines or put mines on the same footing as professions or trades under schedule D. The general effect of the 29 Vict. c. 36, is to alter that scheme and make the rules applicable to the trades and professions, that is to say, the rules contained in schedule D, applicable to mines except so far as there is any inconsistency with No. 3 in schedule A. The 8th section of that Act runs thus:—"The several and respective concerns described in No. III. of schedule A of the said Act," that includes mines, "shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned according to the rules prescribed by schedule D of the said Act so far as such rules are consistent with the said No. III."

When we look at Schedule D, we shall find broadly this distinction: for the purpose of computing the income tax or profits from trade and so on, the average of three years is adopted instead of an average of five years. No. 3 is not touched by the Act of 1866, but all the rules are touched, that is to say, it appears to me, swept away and embodied, and I feel unable to construe the Act of 1866 except as amounting to this: That we are to substitute Schedule D. for the whole of No. 4, applying it to mines, obeying the injunction of this Act, and must not make a substitution where the substitution would be inconsistent with what is left of No. 3. That works out in this way, when Schedule D. is substituted for No. 4 as applied to No. 3, whenever an average of three years occurs we must read five, and No. 3 has effect given to it. One year or an average of five, as the case may be, is to be taken, and with that basis Schedule D is to be applied. I pass over therefore the whole of No. 4 as gone, and I come now to Schedule D and I read Schedule D as applicable to mines, substituting five years for three whenever I find it in a context relating to trades. Schedule D, by the way, has specified in it several cases, and there are six cases all of which have to be looked at as far as they are material. The proviso in the first case relates to cases in which the "trade, manufacture, adventure, or concern, shall have been set up and commenced within the said period of three years." I see reasons for holding that this concern is not within that clause. It is not a new trade. It is a new association carrying on an old trade. That is all. We then pass to the fourth of the rules, applying both to cases 1 and 2, and we read that which my Brother Grove has read, and I think the case falls within it; it appears to me precisely a case in which there has been a "succession," within the meaning of this rule, and, therefore primâ facie the five years rule would apply and be applicable, not because the company is the same as the old partnership which preceded it, but because the Act of Parliament says that in this case of one party succeeding another the five year rule shall apply. But the fourth rule is that the five year rule shall apply, "unless such person succeeding to such business as aforesaid shall prove to the satisfaction of the respective Commissioners that the profits and gains of such business have fallen short, or will fall short from specific cause to be alleged to them since such change or succession took place or by reason thereof." Now the Commissioners have found that the appellants were within that proviso, that is to say the Commissioners have found as a fact, that the profits and gains of the appellants' business have fallen short since the 21st of December, 1875, from the following specific cause, namely, "the extraordinary depression in the iron and coal trades," and so on. Therefore the only question that remains is this, is it specific? If it can be, the Commissioners find that it is. I am not prepared to say it is not. A thing is specific as contrasted with something else, and whether it is contrasted with trade in general or trade in a locality, or whether it means something confined to a particular mine, is all more or less doubtful, and as the Commissioners find that the profits have fallen off by a cause which is specific, or may be specific, depending upon the sense in which the word was used, I am not prepared to say the cause is not specific. That leads us to this, it is a case in which five years' average does not apply. Then we are thrown back as it appears on No. 3 and case 6. No. 3 as I have already pointed out does not say the average is to be always five years, it leaves it in doubt, because it says: "The annual value of all the properties hereinafter described shall be understood to be the full amount for one year on the average of five years," according to the rules and circumstances of the case. The five years are gone, therefore primâ facie one year would remain under that; but this does not quite exhaust the case, because, pursuing Schedule D we come down to the sixth case, which seems to meet all cases which have not been previously exactly hit, and this appears to me to be one of those cases not exactly hit. The 6th case is very elastic and not very definite, and in my judgment it is to be applied to this case. The practical result is that the view taken by the Commissioners that this company ought to be assessed on the average of five years is wrong in toto. It will not be exactly one year, because as I understood the combined effect of the sections to which I have last adverted, the average of profits will be taken from December, 1875, to April, 1877, which will ascertain the profits for about sixteen months. Substantially the appellants are right and the Commissioners are wrong, but the matter ought to go back upon the principle which my Brother Grove and I both agree in, with the same conclusions though from slightly different grounds, and there will be no costs.

Judgment for the appellants.

Solicitors for appellants: *Shum, Crossman, & Co.*
Solicitor for respondent: *Solicitor to the Inland Revenue.*

J. R.

June 21.

THE SCHOOL BOARD FOR LONDON, APPELLANTS; JACKSON, RESPONDENT.

Elementary Education Act, 1876 (39 & 40 *Vict. c.* 79), *s.* 3—*Neglect to Educate a Child—Parent—Liability where Child in the actual custody of some other Person.*

The respondent was summoned for non-compliance with an Order under s. 11 of the Elementary Education Act, 1876, to educate a child of which she was the parent. The child was not residing with the respondent, but with a relative, and the magistrate on that ground refused to convict:—

Held (by Coleridge, C.J., Pollock, B., and Manisty, J.), that the interpretation clause, which declares that the term parent shall include "guardian and every person who is liable to maintain, or has the actual custody of any child," does not affect the primary liability of the parent, if there be one, and that the respondent ought to have been convicted.

CASE stated by a magistrate of one of the police courts of the metropolis.

1. On the 16th of June, 1880, an order was made by the magistrate upon the complaint of William Saunders, an officer of the School Board for London, under the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 11, sub-s. 1, against Caroline Jackson, a widow, residing at 16a, Grosvenor Street, Islington, requiring her to cause her child Ada Jackson to attend the board school in Hanover Street, in the parish of Islington, being a certified efficient school as defined by the Act, willing to receive the child, and selected by the defendant the parent.

2. On the 3rd of November, 1880, a summons was applied for by the school board, and issued against the defendant under s. 12, sub-s. 2, of the statute aforesaid, for unlawfully neglecting without reasonable excuse to comply with the former order. On the hearing of the summons the defendant stated that she was a widow, that her daughter Ada Jackson was between thirteen and fourteen years of age, that she, the defendant, was very poor, and being quite unable to maintain her child, had sent her to an aunt at Fulham, who had kindly taken her. She also stated that the child went sometimes to stay with another aunt.

3. The magistrate dismissed the summons upon the ground that it was not proved that the child was residing with and under the control of the defendant, her mother. He considered that the person who had the actual custody of the child would be liable to conviction for not sending the child to school; that the section defining the term "parent" (33 & 34 Vict. c. 75, s. 3) "Parent includes guardian and every person who is liable to maintain or has the actual custody of any child," did not contemplate that both the parent and the person having the actual custody of a child should be simultaneously liable to be convicted, and that the primary liability would lie with the person who had the actual custody of the child.

The question for the decision of the Court was whether the defendant should have been convicted.

Jeune for the appellants.

The respondent did not appear.

LORD COLERIDGE, C.J. I think the magistrate was wrong in this case, and that the defendant ought to have been convicted. I do not propose to discuss how the matter might have been under a variety of circumstances, which may or may not arise hereafter, it is enough for me to say that this is a question of the construction of the word "parent" in the interpretation clause, and I have arrived at a conclusion as to this on this short ground. It was intended by the Education Act that the children of England should be educated, and it was intended to impose the responsibility of sending them to school upon definite persons where those definite persons exist. Primarily the person on whom it imposes that responsibility is the parent. In certain specified cases the parent is exempted from this responsibility, but the present is not one of those cases. This is the case of a parent within the meaning of the interpretation clause who has had an order made against her which is not obeyed, and she ought to be convicted. I am of opinion that the object being that children should be educated, parents are the first persons on whom the order should be made. The fact that the word "parent" includes by the interpretation clause other persons, guardians, persons liable to maintain, and persons who have the actual custody, if there be any such, does not appear to me to prevent the operation of the word "parent" in its primary and obvious sense, where there is a person who comes under that description.

POLLOCK, B. I have come to the same conclusion. Sect. 11 of the Act of 1876 imposes a primary and affirmative duty upon the parent of a child under a certain age, and under certain circumstances. The same section contains what are to be reasonable excuses for non-compliance with an order. I do not say that those exceptions necessarily include all the cases in which a parent might be held to be excused. The permanent residence of a child away from its parent might, though I give no decision on the point, be such a case; but that point is not raised here, and I entirely agree that the fact that other persons are included within the term "parent" does not limit the liability of the parent, but that this extension of the meaning of the word was intended to meet cases where, for instance, there is no parent, and perhaps other cases which we have not at present before us. It seems to me that the conclusion to which the magistrate came was not the correct one.

MANISTY, J., concurred.

Case remitted to the magistrate.

Solicitors for appellants: *Gedge, Kirby, & Co.*

A. M.

THE LISKEARD UNION, Appellants; THE LISKEARD WATERWORKS COMPANY, Respondents.

1881
June 21.

Waterworks Company—Workhouse—Supply of Water for Public Purposes—Waterworks Clauses Act, 1847 (10 *Vict. c.* 17), *s.* 37–43.

By a special Act, incorporating the Waterworks Clauses Act, 1847, a waterworks company were bound at the request of the owner or occupier of any house to supply such person with water for domestic purposes at a minimum rate, to be increased if such house should be occupied by more than one family, and the Act further provided that a supply of water for domestic purposes should not include a supply of water for baths, washhouses, or public purposes. The Waterworks Clauses Act, 1847, deals with the supply of water for cleansing sewers and drains, cleansing and watering the streets, supplying any public pumps, baths, or washhouses, and imposes a penalty for neglect to supply water "for the public purposes aforesaid":—

Held (by Lord Coleridge, C.J., Pollock, B., and Manisty, J.), that a workhouse was a house of which the guardians were owners, and the company were bound to supply them with water for domestic purposes, such supply not being a supply "for public purposes" within the meaning of the Special Act or of the Waterworks Clauses Act, 1847, and that for the purposes of the special Act the inmates of the workhouse were to be treated as one family and the rate assessed accordingly.

Case stated on an information by the appellants against the respondents, under the 33rd section of the Liskeard Waterworks Act, 1860, hereinafter referred to as the special Act, charging that the respondents did unlawfully refuse to furnish to the appellants, being the owners and occupiers of a certain house called the Workhouse in a certain street there situate, in which a main pipe had been laid by the respondents, a sufficient supply of water for domestic use; the appellants being persons who, under the provisions of the 33rd section of the special Act, were entitled to demand and receive a supply of water for domestic purposes and who had tendered rates for such supply. The justices dismissed the information, but stated a case from which the following facts appeared:—

The Liskeard Poor Law Union comprises twenty-three parishes besides the borough and parish of Liskeard. The average number of inmates of the workhouse, exclusive of the officers is about one hundred and sixty. On the 5th of February last there was a main pipe of the respondents laid in the street in which the

1881

LISKEARD UNION v. LISKEARD WATERWORKS Co.

workhouse is situate, and the appellants demanded a supply of water for domestic purposes for the use of the officers and inmates of the workhouse, and the respondents refused to supply it. The appellants had tendered for such supply the sum of 12*l.* (being after the rate of 6*l.* per cent. upon the anuual value of the workhouse) under the provisions of the Waterworks Clauses Act, 1847, and the 33rd section of the Special Act.

On the part of the respondents it was contended that the workhouse was not a house or dwelling-house within the meaning of the 33rd section of the special Act (1), and that the appellants, although owners of the workhouse of the Liskeard Poor Law Union, were not the owners or occupiers of any house or part of a

---

(1) Liskeard Waterworks Acts, 1860 (23 Vict. c. xiii).

Sect. 33. The company shall, at the request of the owner or occupier of any house or part of a house in any street in which any main pipe of the company shall be laid, or of any person who under the provisions of this Act or any Act incorporated herewith shall be entitled to demand a supply of water for domestic purposes, furnish to such occupier or other person a sufficient supply of water for domestic use, at a rate per centum per annum, not exceeding six pounds upon the annual rack rent or value of such house: provided always, that the company shall not be obliged to furnish such supply for any less sum than four shilling and fourpence in any one year (being at the rate of one penny per week), where such dwelling-house shall be occupied by one family only, nor for any less sum than four shillings and fourpence in any one year for each family in one dwelling-house, where such dwelling-house may be occupied by one or more families, if such supply does not include a supply of water to one watercloset for each family in such dwelling-house, or for any less sum than ten shillings in any one year for each such family, if such supply does include a supply to one watercloset to each such family.

Sect. 34. A supply of water for domestic purposes as aforesaid shall include a supply for one watercloset in each such house, but shall not include a supply of water for railway purposes, or for baths, washhouses, or public purposes, or for horses or cattle, or for washing carriages, where such horses or carriages are let for hire or are the property of a dealer, or for any ornamental purpose, or for any steam engine, or for any brewery, warehouse, stable, store, vault, workshop, mill or manufactory, or for shipping, or for any trade, manufacture, or business whatsoever.

Sect. 35. The company may supply any person, body, or corporation with water (for other than domestic purposes) at such rate and upon such terms and conditions as shall be agreed upon between the company and any such person, body, or corporation desirous of having such supply of water.

Sect. 36. Subject to the provisions of this Act in relation to houses occupied by more than one family, the company, in addition to the rates for the supply for domestic purposes, may demand and receive, for any second watercloset in any house, a yearly sum not exceeding eight shillings, and for every private house within the meaning of the same section, and were not persons who, under the provisions of the special Act or any Act incorporated therewith, were entitled to demand a supply of water for domestic purposes for the use of the officers and inmates of the said workhouse.

It was also contended on the part of the respondents that they were not bound to supply water to the appellants for the use of the officers and inmates of the workhouse, but that if the appellants were desirous of being furnished with such supply the respondents might supply water for such use under s. 35 of the special Act; and it was also further contended on the part of the respondents that water supplied for use of the inmates of the workhouse is water supplied to the appellants for public purposes under s. 34, and not for domestic purposes under s. 33 of the special Act.

It was also contended on the part of the respondents that the inmates of the workhouse did not constitute one family within the

---

bath a yearly sum not exceeding eight shillings, and for each additional water-closet beyond two, and for each private bath beyond one, a yearly sum of four shillings.

The Waterworks Clauses Act, 1847, was incorporated with the special Act, and by s. 35 "The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, who as hereinafter provided shall be entitled to demand a supply, and shall be willing to pay water-rate for the same. . . . ."

By s. 37. "In all the pipes to which any fire-plug shall be fixed, the undertakers shall provide and keep constantly laid on, unless prevented by frost, unusual drought, or other unavoidable accident, or during necessary repairs, a sufficient supply of water for the following purposes, that is to say: for cleansing the sewers and drains, for cleansing and watering the streets, and for supplying any public pumps, baths, or washhouses, that may be established for the free use of the inhabitants, or paid for out of any poor-rates or borough rates levied within the limits of the Special Act. . . . ."

Sections 38–42 deal with the fixing and supply of public fire plugs in mains, and by s. 43 the undertakers are liable to a penalty if they neglect or refuse (inter alia) to fix, maintain, or repair such fire plugs, "or to furnish to the town commissioners a sufficient supply of water for the public purposes aforesaid."

The Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), is incorporated with the Waterworks Clauses Act, 1847, and by s. 12, "A supply of water for domestic purposes shall not include a supply of water for cattle or horses, or for washing carriages where such horses or carriages are kept for sale or hire, or by a common carrier, or a supply for any trade, manufacture, or business, or for watering gardens, or for fountains, or for any ornamental purpose.

meaning of the same section, but that the workhouse was occupied by various persons who constituted distinct families.

The questions for the opinion of the Court were:—

Whether water supplied for the use of the officers and inmates of the workhouse, is water supplied to the appellants for public purposes under s. 34 of the special Act, or

Whether the appellants were entitled to a supply of water for domestic purposes for the use of such officers and inmates under the 33rd section of the special Act, and, if so entitled, whether the officers and inmates constituted one or more families within the meaning of the same section.

Charles Hall, Q.C., for the appellants. The workhouse is clearly the property of the guardians, and it is a dwelling-house. The water is required for precisely the same purposes as any private person having a house and family would require it for, and, therefore, these purposes are not public purposes contemplated by the special or the general Act.

Arthur Charles, Q.C., for the respondents. If the workhouse is to be treated as a dwelling-house, more than one family resides there, and the tender of payment by the appellants was insufficient. The principal question, however, is whether this is not a public purpose. The maintenance of the poor is a public purpose: *Reg.* v. *Wallingford Union* (1), and the guardians require this water supply in their public capacity.

LORD COLERIDGE, C.J. I think the appellants are entitled to succeed on all the points raised. In the first place it is clear to me that the workhouse is a dwelling-house within s. 37 of the special Act, and Mr. Charles does not contest that the guardians are owners. It is then said that the water supplied to a workhouse is not supplied for domestic purposes within the meaning of s. 33, because the maintenance of paupers in England is a public purpose. No doubt this is true, but in the prosecution of that which is a public purpose there may be domestic uses, and this is one. That would be one answer to the objection, but further, we are not to consider what is a public purpose treating the matter generally, but what is a public purpose within the meaning of the special Act, and I think that the supply of water such as is required here, is not a public purpose contemplated by the Act. We have before us the special or private Act, and also the public general Act, the Waterworks Clauses Act, 1847, which is incorporated in the special Act, the words of which are to have the same meaning as they have in the general Act. In the latter the expression public purposes in s. 43, is confined to certain purposes specified in s. 37 of which this is not one. If the matter after this remained doubtful, the argument for the appellants is strengthened by the 34th section of the special Act which enumerates certain things, "baths, washhouses, or public purposes," which do not include such an object as the present.

---

(1) 10 Ad. & E. 259.

As to the objection that the inhabitants of a workhouse cannot be termed one family, the proviso seems to raise a difficulty, but still I think that the paupers in the workhouse are one family within the meaning of the statute. I do not intend to attempt to define the expression "one family," but it seems to me to be clear that a body of persons forming one organisation in a building however large, are to be treated for the purposes of this Act as one family. Every large family is partly made up of persons quite unconnected by ties of blood or marriage, and the number of those so connected may bear a very small proportion to the whole number of persons collected together, as for instance, in the case of a school, where a number of persons of different families are collected from different places, but under one head, and one roof, and are for all practical purposes one family. I think for these reasons the appellants are entitled to succeed.

POLLOCK, B., and MANISTY, J., concurred.

Judgment for the appellants.

Solicitors for appellants: *J. E. Fox & Co., for A. C. L. Glubb, Liskeard.*

Solicitors for respondents: *R. W. Childs & Batten, for Childs & Son, Liskeard.*

A. M.

1881
June 28.

LILLEY *v.* DOUBLEDAY.

Damages—Warehouseman—Breach of Contract—Remoteness—Negligence.

The defendant contracted to warehouse certain goods for the plaintiff at a particular place, but he warehoused a part of them at another place where, without any negligence on his part, they were destroyed. In an action to recover as damages the value of the goods:—

Held (by Grove, Lindley, and Stephen, JJ.), that the damage was not too remote, and that the defendant, by his breach of contract, had rendered himself liable for the loss of the goods.

Motion to enter judgment for the plaintiff pursuant to the findings of the jury. A rule for a new trial, on the ground that the findings were wrong, was disposed of in the course of the argument. The action was to recover the value of certain drapery goods warehoused by the defendant for the plaintiff, which were destroyed by fire. The contract was that the goods should be deposited at the defendant's repository at Kingsland Road, but a portion of them were deposited by the defendant elsewhere, and a fire occurring they were destroyed. The plaintiff had insured the goods, giving Kingsland Road as the place where they were deposited, and in consequence lost the benefit of the insurance.

Murphy, Q.C., and *C. E. Jones*, for the plaintiff, contended that there had been a conversion of the goods by the defendant, which entitled the plaintiff to recover their value, and further that, the contract being to keep the goods at Kingsland Road, and that contract having been broken, the defendant took the risk of the loss of the goods on him, and was liable for their value: *Davis* v. *Garrett.* (1)

Addison, Q.C., and *J. R. Dunlop Hill*, for the defendant, contended that there had been no conversion, and that there having been no intention to convert the goods to the defendant's use and nothing to change their quality, the defendant would only be liable in case he did not use reasonable care as a warehouseman: *Fouldes* v. *Willoughby* (2); that the damages claimed would be too remote within the rule of *Hadley* v. *Baxendale* (3), as not being

(1) 6 Bing. 716.

(2) 8 M. & W. 540.

(3) 9 Ex. 341. 18 Jur 359

in the contemplation of the parties, and that *Hobbs* v. *London and South Western Ry. Co.* (1) was an authority in favour of the defendant. They also referred to *Heald* v. *Carey* (2); *Glynn* v. *East and West India Dock Co.* (3); *British Columbia Saw Mill Co.* v. *Nettleship.* (4)

Grove, J. I think the plaintiff is entitled to judgment. It seems to me impossible to get over this point, that by the finding of the jury there has been a breach of contract. The defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another, and must be responsible for what took place there. The only exception I see to this general rule is where the destruction of the goods must take place as inevitably at one place as at the other. If a bailee elects to deal with the property entrusted to him in a way not authorised by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself. That proposition is fully supported by the case of *Davis* v. *Garrett* (5), which contains very little that is not applicable to this case. It was argued that that case was decided on the ground that the defendant was a common carrier, but that is not the ground of the judgment of Tindal, C.J., who decided that as the loss had happened while the wrongful act of the defendant was in operation and was attributable to his wrongful act, he could not set up as an answer to the action the bare possibility of the loss if his wrongful act had never been done, and he illustrated the case by saying that a defendant who had by mistake forwarded a parcel by the wrong conveyance, if a loss had thereby ensued, would undoubtedly be liable. I do not give any opinion whether what was done here amounted to a conversion, but I base my judgment on the fact that the defendant broke his contract, by dealing with the subject-matter in a manner different from that in which he contracted to deal with it. The only case that would have made me hesitate is *Hobbs* v. *London and South Western Ry. Co.* (1), and that we are told has some doubt thrown

---

(1) Law Rep. 10 Q. B. 111.

(2) 11 C. B. 977.

(3) 6 Q. B. D. 475.

(4) Law Rep. 3 C. P. 499.

(5) 6 Bing. 716.

1881

LILLEY
v.
DOUBLEDAY.

on it in a recent case in the Court of Appeal (1), at all events the doubt induced by the former case is not strong enough to make me alter the opinion I have expressed on this one. There will, therefore, be judgment for the plaintiff.

LINDLEY, J. I am of the same opinion. The plaintiff gave his goods to the defendant to be warehoused at a particular place, the defendant warehoused them elsewhere, where, without any particular negligence on his part, they were destroyed. The consequence is that the plaintiff has a cause of action and is entitled to damages. The question is, what damages? *Hadley* v. *Baxendale* (2) is wide of the mark, because the question here is whether the defendant was responsible for the goods, and if so the damages must be their value. Then, it is further said that the defendant was responsible only for want of reasonable care, but is that so when he has departed from his authority in dealing with the goods? I give no opinion whether there is a conversion of the goods; the question is, what answer has the defendant to the plaintiff who asks for them back. Can he say he will neither return the goods nor pay their value. I think he cannot. The reasoning in *Davis* v. *Garrett* (3) is applicable to this case, and *Burrows* v. *March Gas and Coke Co.* (4) shews that the damage is not too remote.

STEPHEN, J., concurred.

Judgment for the plaintiff.

Solicitors for plaintiff: *Phelps, Sidgwick, & Biddle.*
Solicitors for defendant: *Marsden & Son.*

(1) *M'Mahon* v. *Field*, post, p. 591.
(2) 9 Ex. 341. 18 Jur. 358
(3) 6 Bing. 716.
(4) Law Rep. 5 Ex. 67; on appeal, Law Rep. 7 Ex. 96.

A. M.

DAVIS *v.* THE JUSTICES OF PEMBROKESHIRE.

1881
Aug. 1.

Justice of the Peace—Disqualification—Coroner.

A justice of the peace does not become disqualified from acting as such, by reason of his being elected coroner for the county or division for which he so acts as justice.

On the 31st of May, 1881, two justices of Pembrokeshire, sitting in petty sessions, made an order upon John Davis under the statute 36 & 37 Vict. c. 9, adjudging him to be the father of a bastard child, and ordering him to pay 1*s.* 6*d.* a week towards its maintenance. It appeared that one of the justices before whom the summons was heard was the coroner for the same division of the county.

Bigham, moved for a certiorari to bring up the order to be quashed, on the ground that the coroner was not competent to act as a justice of the peace. In Hawk. P. C., Bk. 2, c. 8, p. 48, is the following passage: "It is said that, if a justice of the peace be created a duke, archbishop, marquis, earl, viscount, baron, bishop, knight, judge, or serjeant-at-law, yet this will not take away his authority as justice of the peace: but, if he be made coroner, this, by some opinions, is a discharge of his authority of justice. By 1 Mary, sess. 2, c. 8, no person having or using the office of a sheriff of any county shall use or exercise the office of a justice of the peace by force of any commission or otherwise, in any county where he shall be justice, during the time only that he shall exercise the said office, or sheriffwick: and all acts done by such sheriff by authority of any commission of the peace during the time aforesaid shall be void." And at p. 89, n., it is said: "The coroner possesses a ministeral office as the sheriff's substitute; for, when just exception can be taken to the sheriff for suspicion of partiality (as, that he is interested in the suit or of kindred to either of the parties), the process must then be awarded to the coroner instead of the sheriff for the execution of the King's writ:" 4 Inst. 271; 1 Com. 349. One reason therefore would seem to be that the two offices are incompatible: see

Rex v. *Patteson.* (1) Another reason may be that the fees or salary payable to the coroner are in the discretion of the justices: see 25 Geo. 2, c. 29, s. 2; 23 & 24 Vict. c. 116, s. 4. Dalton, Justice, c. 3, p. 12, says: "If a justice of peace be made a coroner of the county, this by some opinions is a discharge of his authority of justiceship of peace:" citing Lambard's Eirenarcha, p. 66.

[LINDLEY, J. A passage in Com. Dig. *Justices of Peace* (A. 4.) looks the other way,—"By the common law, a man might be conservator of the peace by his office, as (amongst others) a sheriff or coroner."

GROVE, J. In Stephen's Commentaries, 7th ed. 641, it is said: "The coroner is a conservator of the King's peace, and becomes a magistrate by virtue of his appointment, having power to cause felons to be apprehended, whether an inquisition had been found against him or not. The ministerial office of the coroner is only as the sheriff's substitute in executing process." So, in Jervis on Coroners, 4th ed. 27, it is said that "coroners are conservators of the Queen's peace, and become magistrates by virtue of their election and appointment."]

But their power as justices is a limited one, as appears from Dalton, p. 3,—"Coroners also (by the common law) are conservators of the peace within the county where they be coroners; but they (as also all other the conservators of the peace by the common law) have power for the keeping of the peace only as the constables have to this day, to wit, they may take surety for the peace by obligation."

Cur. adv. vult.

August 1, 1881. GROVE, J. This was an application of an exceptional character. It was for a certiorari to bring up an order of justices to be quashed, on the ground that one of the justices by whom the order was made was disqualified to act as a justice of the peace, he being coroner for the division of the county for which he was so acting. The grounds upon which Mr. Bigham contended that a coroner is disqualified to act as justice of the peace were two,—one, that his fees or salary are fixed by the justices,—the other, that the coroner may in certain cases be called upon to act as the sheriff's substitute in the execution of the King's writs, and therefore the two offices are incompatible. No decided case was referred to in support of either contention, and, as it seems to me, no sufficient reason. The authorities relied on were certain passages from Dalton's Sheriff and Hawkins's Pleas of the Crown, and a dictum in *Rex* v. *Patteson* (1), that an alderman and justice of the peace of a city cannot be county treasurer, inasmuch as the two offices are incompatible and cannot be held together. The only foundation however for the statements in the above text-books, and others which were mentioned, is a passage in Lambard's Eirenarcha, pp. 66, 67,—"It seemeth that some took the law to be that, if a justice of the peace were created a duke, marquesse, earl, viscount, or baron, or were elected an archbishop or bishop, or were made a knight, or justice of any of the two benches, or serjeant-at-law, then his office of the peace was determined thereby; because it could not be thought that (his name being changed) he should remain the same person: and so, if he were made sheriff, that his justiceship ceased also; because (as Mar. saith) he could not be both a justice and an officer, to direct and serve his own precepts: and so likewise was it thought of him, if he were made a coroner; but not so if he were made an undersheriff." The author then goes on to shew how this was altered, as regards the sheriff, by statutes 1 E. 6, c. 7, and 1 Mar. Parl. 1, c. 8. We (2) consider that far too doubtful an authority to induce us to disturb what seems to have been the practice for years, or to increase these disabilities, which we are disposed to think too numerous already. There will be no order.

---

(1) 4 B. & Ad. 9.

Order refused.

Solicitors for applicant: *Peacock & Goddard.*

---

(1) 4 B. & Ad. 9.

(2) Grove and Lindley, JJ.

J. S.

1881
March 18.

[IN THE COURT OF APPEAL.]

SEAL *v.* CLARIDGE.

Bill of Sale—Attestation by Grantee—Apparent Possession—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 4, 8, 10.

9QBD138
ChD545

The grantee of a bill of sale, although he may be a solicitor, cannot be the attesting witness thereof under the Bills of Sale Act, 1878, s. 10, subs. 1.

J. having executed a bill of sale, a man was put in possession of the goods comprised in it by the grantee. The house, in which the goods were, belonged to J., and he had a key of it; he did not sleep in it, but he went in and out as he pleased:—

Held, that the goods were in the possession or apparent possession of J. within the meaning of the Bills of Sale Act, 1878, ss. 4, 8.

INTERPEADER ISSUE.

The plaintiff was a solicitor, and was the grantee of a bill of sale executed by one Johnson; the bill of sale was attested by the plaintiff. Johnson went away with his family from Birmingham where the goods comprised in the bill of sale were, to Brighton. An auctioneer went to Johnson's house for the purpose of taking possession of the goods upon behalf of the plaintiff; he found a clerk packing up some goods, and told him not to remove them. The auctioneer left a man in possession. Johnson afterwards returned to the house, and having a key went in and out as he pleased. He did not sleep in the house. The defendant was an execution creditor of Johnson.

At the trial without a jury at Warwick, Huddleston, B., held that the attestation of the bill of sale was insufficient within the Bills of Sale Act, 1878, and that the goods comprised in the bill of sale were still in the apparent possession of Johnson. (1) He therefore gave judgment for the defendant.

---

(1) By the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4, "Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

Sect. 8: "Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act

The plaintiff appealed.

J. S. Dugdale, for the plaintiff. First, the bill of sale has been attested by a solicitor, and this is sufficient to give it validity. A bill of sale may be valid without any attestation: *Davis* v. *Goodman* (1); and the mere omission by the solicitor properly to perform his duty will not annul the transaction: *Ex parte National Mercantile Bank; In re Haynes.* (2) The old practice as to cognovits and warrants of attorney is very much in point for the present case, and under that practice it was originally sufficient if the document was executed by the defendant in the presence of the plaintiff's attorney; the practice, however, was found inconvenient and was altered: 1 Tidd's Practice, 9th ed. 549; *Mason* v. *Kiddle.* (3) These authorities shew that in the absence of some statutory direction or some rule of court, where the execution of a document is to be attested by a solicitor, it is sufficient although he is the solicitor of the party opposed in interest to the grantor or even that party himself. It may be that if the grantor of a bill of sale were a solicitor he could not attest his own signature; but the present case stands upon different grounds.

But, secondly, it is contended for the plaintiff that at the time of the seizure by the defendant as execution creditor the goods were not in the possession of Johnson within the meaning of the Bills of Sale Act, 1878, s. 8. It is not material that the house containing the goods was Johnson's: *Ex parte Saffery; In re*

---

within seven days after the making or giving thereof, ... otherwise such bill . . . . as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which at or after the time . . . . of executing such process . . . . and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale."

Sect. 10, subs. 1: "The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor."

(1) 5 C. P. D. 128.

(2) 15 Ch. D. 42.

(3) 5 M. & W. 513, at p. 514, per Alderson, B.

Bremner (1); as he slept elsewhere, he did not occupy the house so as to defeat the grant made by him: *Robinson* v. *Briggs.* (2) Moreover, the auctioneer on behalf of the plaintiff, interfered to prevent the removal of the goods, and this was such an act of ownership as to determine the possession of Johnson: *Ex parte Jay; In re Blenheim.* (3)

W. Graham, and *Eustace Smith,* for the defendant, were requested by the Court to confine their argument to the first point. The ancient rule was that the witnesses to a deed were the persons present at the execution, in order to prove the transaction at a future time if it should be called in question: Co. Litt. 6a; 2 Black. Com. ch. 20, p. 307. The party to a deed cannot be a witness to it: *Coles* v. *Trecothick* (4); *Freshfield* v. *Reed.* (5) In former days when witnesses were excluded on the ground of interest, if the subscribing witness to a bond were interested therein as well at the time of attestation as at the time of trial, he could not be examined as a witness to prove the execution: *Swire* v. *Bell.* (6)

J. S. Dugdale, replied.

LORD SELBORNE, L.C. We are against the appellant upon both points.

I will deal first with the second question, which depends upon the inference to be drawn from the facts proved with regard to the words in the 8th section of the Bills of Sale Act, 1878, as explained by the interpretation clause contained in s. 4. The goods comprised in the bill of sale were in the house of the grantor, to or from which he went at his pleasure. It is true that he did not sleep in the house, but no doubt he might have done so if he had thought fit. Another point is, whether more than formal possession had been taken on behalf of the grantee. It is true that a man had been put in possession of the goods; but nothing more had been done except telling the clerk not to remove the goods. We think that the goods were still in the possession or, at least, the apparent possession of the grantor.

---

(1) 16 Ch. D. 668.

(2) Law Rep. 6 Ex. 1.

(3) Law Rep. 9 Ch. 697.

(4) 9 Ves. 234, at p. 251, per Lord Eldon, C.

(5) 9 M. & W. 404.

(6) 5 T. R. 371.

9 Q.B.D. 138

The first question is of more general interest. I was at first surprised that no authority could be found directly in point; but no doubt the common sense of mankind has always rejected the notion that the party to a deed could also attest it. I do not pay much attention to the old rule of evidence whereby interested persons were rendered incompetent as witnesses; it has now been done away with by statute. What is the meaning of the word "attestation," apart from the Bills of Sale Act, 1878? The word implies the presence of some person, who stands by but is not a party to the transaction. The view which I take seems to be confirmed by the circumstance that attestation is unnecessary, unless it is required by an instrument creating a power or by some statute. If the argument of Mr. Dugdale is correct, the attestation required by the Bills of Sale Act, 1878, would be satisfied by the mere repetition of the signature of a party to the deed; can this be regarded as a useful provision? I do not place much reliance upon what was said by Lord Eldon, L.C., in *Coles* v. *Trecothick* (1), but I do rely upon *Freshfield* v. *Reed.* (2) It follows from that case that the party to an instrument cannot "attest" it. When I pass to the provisions of the Bills of Sale Act, 1878, I find that it is necessary that the execution of a bill of sale shall be attested by a solicitor. This means that a solicitor shall be an independent witness. It has been admitted that if the grantor were a solicitor he could not attest his own signature; but it is contended that it is different in the present case where the grantee is a solicitor. It was the intention of the legislature that the nature of the bill of sale should be explained to the grantor; one object, no doubt, was that he should be adequately protected; can it be said that an attestation by a grantee is sufficient, when he has the greatest possible interest to deceive the grantor, if he is inclined to be fraudulent or to be guilty of mal-practice? He is not to attest an instrument which is to operate chiefly for his own benefit. It is not necessary to go further; but I may point out that the legislature has required a description of the residence and occupation of the attesting witness to be stated; this is an intimation that the attestation must be real and effective. We

---

(1) 9 Ves. 234, at p. 251.

(2) 9 M. & W. 404.

1881

SEAL
v.
CLARIDGE.

think that the attestation was insufficient, and that the appeal must be dismissed.

BAGGALLAY, L.J. I am of the same opinion. I only wish to mention two cases which have been cited, and in which I was a party to the decision. Neither of them bears upon the case before us. In *Davis* v. *Goodman* (1) the question arose simply between grantor and grantee; and it was there held that as between them no attestation or registration was requisite. In *Ex parte National Mercantile Bank, In re Haynes* (2) it was held that, if the attestation states that a proper explanation has been given, it is immaterial that in point of fact the solicitor has failed to discharge the duty imposed upon him.

BRAMWELL, L.J., concurred.

Appeal dismissed.

Solicitor for plaintiff: *J. W. Sykes.*

Solicitors for defendant: *Indermaur & Co., for Alfred Peet, Birmingham.*

J. E. H.

March 19.

[IN THE COURT OF APPEAL.]

CONELLY *v.* STEER.

Bill of Sale—Priority—Registered Bill of Sale—Unregistered Bill of Sale—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), s. 10.

[illegible] 4
21ChD540

A bill of sale attested and registered under the Bills of Sale Act, 1878, takes priority over one that is earlier but unregistered, as to any chattels which may be comprised in both.

Lyons v. *Tucker* (6 Q. B. D. 660) dissented from.

APPEAL by the plaintiff from the judgment of Bowen, J., after trial.

Croston, upon the 24th of January, 1879, executed a bill of sale upon goods in favour of the plaintiff. It was not attested or registered, as is required by the Bills of Sale Act, 1878. Upon the 21st of February Croston signed an inventory of the same goods, falling within the definition of "bill of sale" in that statute, and subsequently a formal bill of sale in favour of his father-in-law; the inventory and the bill of sale to Croston's father-in-law were both duly registered under the Bills of Sale Act, 1878. The defendant claimed title through the inventory and the last-named bill of sale. Subsequently the plaintiff endeavoured to take possession of the goods comprised in his bill of sale, but found that the defendant had removed some of the goods, and claimed to remove the rest. Bowen, J., held that the inventory and the later bill of sale took priority over the earlier and gave judgment for the defendant.

---

(1) 5 C. P. D. 128.

(2) 15 Ch. D. 42.

March 18, 19. *Gully, Q.C.*, and *C. Crompton*, for the plaintiff. In *Lyons* v. *Tucker* (1) it has been held that the second clause of the Bills of Sale Act, 1878, s. 10 (2), applies only to the priority of registered bills of sale over one another, and does not apply to a case where an earlier bill of sale has not been registered. It is submitted that that decision is right and ought to be upheld. The words at the beginning of s. 10, which direct attestation and registration, govern the whole of it. In fact the whole of s. 10 ought to be read as part of s. 8.

[BRAMWELL, L.J. It is manifest to me that I ought to have confined the remarks in my judgment in *Davis* v. *Goodman* (3) to the beginning of s. 10.

LORD SELBORNE, L.C. The argument for the plaintiff is in effect that the second clause of s. 10 applies only where there has been either an insolvency or an execution. That is a contention to which I cannot assent.]

Ambrose, Q.C., and *Bigham*, for the defendant, were not called upon to argue.

LORD SELBORNE, L.C. I am of opinion that the judgment of Bowen, J., was right. *Davis* v. *Goodman* (3) does not affect this

---

(1) 6 Q. B. D. 660.

(2) By the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10: "In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels."

(3) 5 C. P. D. 128.

1881

CONELLY
v.
STEER.

case: it merely decided that a bill of sale, which has not been attested and registered as is required by the Bills of Sale Act, 1873, is not void as between the grantor and the grantee. It was there held that the 8th section and the first clause of the 10th section must be read together; I concur in that construction. The first clause of the 10th section is made up of the introductory words and of three sub-sections. The third clause relating to the transfer or assignment of a registered bill of sale has nothing to do with the present case. The material clause is the second. In *Lyons* v. *Tucker* (1) it was the view of Grove, J., that the second clause applied only where two or more bills of sale have been registered: he thought that the grammatical construction required that more than one bill of sale should have been registered, in order to bring the second clause into operation; although he did not decide the case before him upon the ground of grammatical construction alone, yet it is plain from the language of his judgment that this was an argument carrying great weight with him. But, in construing a statute, plural is to read as singular whenever the nature of the subject-matter requires it; and here the manifest interpretation of the statute requires that the second clause of s. 10 shall be read in the singular as well as in the plural: it would be an absurd result to hold that registered bills of sale shall have priority over one another according to the date of their registration, but that a registered bill of sale shall have no priority over one that is unregistered. The registration gives a priority which must prevail. The second clause is a new enactment, and it would nullify the intention of the legislature if priority should be allowed to an unregistered bill of sale over one that is subsequently registered.

The appeal from the judgment of Bowen, J., must be dismissed.

BAGGALLAY, L.J., concurred.

BRAMWELL, L.J. I think that I ought to say that I have been informed by Lindley, J., who took part in the decision of *Lyons* v. *Tucker* (1), that he should have decided the question as to the second clause of s. 10 in the same way in which we do, if he had

(1) 6 Q. B. D. 660.

not thought himself bound to hold pursuant to decisions in the Court of Appeal and elsewhere, that the enactment does not apply as between a registered and unregistered bill of sale.

Appeal dismissed. (1)

Solicitor for plaintiff: *T. Parker, for Parker & Stocks, Manchester.*

Solicitors for defendant: *Pritchard, Englefield, & Co., for Boote & Edgar, Manchester.*

J. E. H.

[IN THE COURT OF APPEAL.]

June 21.

LYONS *v.* TUCKER.

Bill of Sale—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 8, 10—*Unregistered and Registered Bills of Sale—Priority.*

Chattels were assigned to the defendant by a bill of sale, which was not registered. The grantor subsequently gave another bill of sale comprising the chattels to the plaintiff, who registered it. The defendant afterwards took possession of the chattels under his bill of sale. In an action against him by the plaintiff for conversion:—

Held, reversing the judgment of the Queen's Bench Division, that the registered bill of sale took priority over the unregistered bill of sale, and that the plaintiff was entitled to judgment.

APPEAL by the plaintiff from an order of Grove and Lindley, JJ., discharging a rule to set aside the judgment of a county court.

The facts are stated in the report of the proceedings before the Queen's Bench Division (2), and it is unnecessary to repeat them here.

R. S. Wright, for the plaintiff.

Arthur Charles, Q.C., for the defendant. After the decision of this Court in *Conelly* v. *Steer* (3), it is difficult to support the judgment of the Queen's Bench Division in the present case. There is, however, a distinction between the facts: in *Conelly* v. *Steer* (3) the holder of the registered bill of sale had taken possession of the chattels, and there was no possession by the grantee under the

---

(1) See next case.

(2) 6 Q. B. D. 660.

(3) Ante, p. 520.

1881

LYONS
v.
TUCKER.

unregistered bill of sale: in the present case the grantee under the unregistered bill of sale has seized the goods; the holder of the registered bill of sale has not had possession. It is submitted that this circumstance makes a difference in principle between the two cases.

PER CURIAM (Bramwell, Brett, and Cotton, L.JJ.) It is immaterial whether the grantee under the registered or unregistered bill of sale is in possession of the goods. That circumstance makes no difference. The decision of the Queen's Bench Division must be overruled upon the authority of *Conelly* v. *Steer*. (1)

Appeal allowed.

Solicitors for plaintiff: *Park, Nelson & Co.*
Solicitors for defendant: *Aldridge, Thorn, & Morris.*

J. E. H.

March 31.

[IN THE COURT OF APPEAL.]

SMALLEY AND ANOTHER *v.* HARDINGE.

Landlord and Tenant—Bankruptcy of Lessee after granting Sub-lease—Disclaimer by Lessee's Trustee of Lessee's Interest in Premises—8 & 9 *Vict.* c. 106, s. 9—*Bankruptcy Act*, 1869 (32 & 33 *Vict.* c. 71), ss. 23, 125.

9 QBD 282
284
22 ChD 16, 19
21

When a lessee sublets, and afterwards becomes bankrupt, and his trustee, under s. 23 of the Bankruptcy Act, 1869, and under an order of the Court of Bankruptcy, disclaims the lessee's interest in the premises, the lessor is not entitled to eject the sub-tenant.

Lessee for a term of years by deed demised part of the premises for a shorter term, and the sub-lessee entered into possession. The lessee afterwards liquidated by arrangement, under the Bankruptcy Act, 1869, and his trustee, under an order of the Court of Bankruptcy, disclaimed the lessee's interest in the premises. Notice of the application to the Court for leave to disclaim was given to the sub-lessee within a reasonable time before the order was made. The lessor having brought an action to recover possession of the part of the premises demised to the sub-lessee as from the date of the appointment of the trustee:—

Held, reversing the judgment of Mathew, J., that the lessor was not entitled to recover possession.

Taylor v. *Gillott* (Law Rep. 20 Eq. 682) commented upon.

APPEAL by the defendant from an order of Matthew, J., overruling a demurrer to a statement of claim.

---

(1) Ante, p. 520.

The allegations in the plaintiffs' pleading are fully stated in the report of the proceedings before Mathew, J. (1), and it is unnecessary to set them out here.

Warmington, for the defendant. This action is substantially in ejectment. The question is, what is the effect of a disclaimer upon the estate of the defendant who is an under-lessee; by the very words of the Bankruptcy Act, 1869, s. 23, the effect is the same as if the surrender had been made by deed; by the common law, when a lease was surrendered the term which it had created was extinguished as between the parties; but as regarded under-lessees and persons deriving any interest out of the term, a surrender operated only as a grant subject to their rights: *Doe* d. *Beadon* v. *Pyke.* (2)

[LUSH, L.J. By 4 Geo. 2, c. 28, s. 6, a lease out of which under-leases had been created might be surrendered in order to be renewed; but the statute preserved the rights of the under-lessees.]

By 8 & 9 Vict. c. 106, s. 9, the original lessor becomes the lessor of the under-lessee.

[*A. Charles, Q.C.*, for the plaintiffs, admitted that an under-lease is not destroyed by the surrender of the original lease when the original lessor and lessee are acting for their own benefit.]

In *Smyth* v. *North* (3), the majority of the Court of Exchequer were of opinion that a disclaimer under s. 23, by the trustee of the assignee of a lease does not affect the rights and liabilities inter se of the lessor and original lessee. Mathew, J., in giving judgment in the present case, relied upon *Taylor* v. *Gillott.* (4) Perhaps that case has been substantially overruled; but it is at all events distinguishable in its facts, because only an agreement for an under-lease had been executed, whereas in the present the legal estate in the under-lease was in existence which had vested in the defendant. The ordinary consequences of a surrender must follow the disclaimer: *Ex parte Brook; In re Roberts* (5); and the lessor has not a remedy against the trustee: *Lowrey* v.

---

(1) 6 Q. B. D. 371.

(2) 5 M. & S. 146, at p. 154.

(3) Law Rep. 7 Ex. 242.

(4) Law Rep. 20 Eq. 682.

(5) 10 Ch. D. 100, at p. 110.

1881

SMALLEY
v.
HARDINGE.

Barker (1); but on the other hand the trustee cannot disclaim so as to injure the rights of an equitable mortgagee who upon executing a proper indemnity is entitled to have the lease assigned to him: *Ex parte Buxton; In re Muller.* (2) The remedy of the lessor for any injury which he may have sustained is by proving against the estate of the liquidating debtor: *Ex parte Corbett; In re Shand.* (3) The question in the case now before the Court has arisen in Ireland, and has there been decided in favour of the view urged for the present defendant: *O'Farrell* v. *Stephenson.* (4)

A. Charles, Q.C., and *Moorsom*, for the plaintiffs. If the contention for the defendant be correct, the result will be strange. The original lessor will not be able either to recover the rent, or to enforce the covenants contained in the original lease. The under lessee ought to have applied to the Court of Bankruptcy, which would have prevented any injury from accruing to him. After the disclaimer has been executed, the lease is in effect annulled, and the lessor's title is complete and cannot afterwards be impeached: *Ex parte Ditton, In re Woods.* (5) If the contention for the plaintiffs is right, the defendant need not have lost his term by the disclaimer; but he would have entered into obligations with the present plaintiffs. *Taylor* v. *Gillott* (6) is the foundation for the judgment of Mathew, J., in the present action: it is true that in that case the estate of the under-lessee was equitable only; but no difference in principle exists. No doubt there are expressions in the judgments of Ball, C., and Fitzgerald, L.J., in *O'Farrell* v. *Stephenson* (4), which favour the contention for the present defendant; but the decision may be supported on grounds consistent with the argument for the present plaintiffs. In *O'Farrell* v. *Stephenson* (4) it was not the original lessor, but the under-lessee who insisted that the term was extinguished. According to the argument for the defendant, by virtue of the disclaimer, the original lessor and the under-lessee are brought into contact. The relation of landlord and tenant either does or does not exist between them; if it does not, the under-lessee is not bound to pay any rent or observe any covenants.

---

(1) 5 Ex. D. 170.
(2) 15 Ch. D. 289.
(3) 14 Ch. D. 122.
(4) 4 Ir. L. Rep. 715.
(5) 3 Ch. D. 459.
(6) Law Rep. 20 Eq. 682.

If it does, the under-lessee becomes tenant upon the terms of the lease to him, which may be very different from those of the original lease. In either event the original lessor is exposed to great hardship.

Warmington, was not called upon to reply,

BRAMWELL, L.J. It seems to me that this is a plain case. I gather that Mathew, J., hardly exercised his own judgment, but gave way to what he thought to be the opinion of one of the Vice-Chancellors. We are not to speculate upon the hardships which may be occasioned by our decision, and we are not to be deterred from administering Acts of Parliament as we find them; but the consequences of the argument for the plaintiffs are startling. The reasons in favour of the contention for the defendant are admirably expressed by Fitzgerald, L.J., in *O'Farrell* v. *Stephenson.* (1) By the Bankruptcy Act, 1869, s. 23, upon disclaimer by the trustee the lease is to be "deemed to have been surrendered." If this had been a surrender at common law, it is clear upon the authorities that this action would not have been maintainable. It has been argued that upon disclaimer the lease must be taken to have been simply annulled, because all surrenders must be accepted by the lessor and must be by mutual agreement, whereas when a trustee in bankruptcy disclaims, there is no voluntary act on the part of the lessor; but the statute in effect says that the lessor shall be deemed to have acted voluntarily. Moreover, it is not to be forgotten that the lessor has the means of protecting himself against the ill consequences which may accrue to him upon the disclaimer. I do not think that the view which I take is inconsistent with the decision in *Taylor* v. *Gillott.* (2) In my opinion the judgments in *O'Farrell* v. *Stephenson* (3) are entirely satisfactory, and I cannot add to the force of the arguments contained in them.

BAGGALLAY, L.J. By the Bankruptcy Act, 1869, s. 23, upon disclaimer the lease is to be deemed to have been surrendered as from the date of the order of adjudication. The construction of the statute may cause very considerable hardship; but that is a matter which we must not take into account; the real meaning of the statute must be considered. I have not heard any argument shaking my view as to the true construction of s. 23; upon the disclaimer of the lease, the estate of the plaintiffs by force of 8 & 9 Vict. c. 106, s. 9, became the reversion expectant upon the under-lease for the purpose of preserving the incidents and obligations annexed to it. The action is not maintainable.

---

(1) 4 Ir. L. Rep. 715, at p. 724.

(2) Law Rep. 20 Eq. 682.

(3) 4 Ir. L. Rep. 715.

Lush, L.J. I am unable to agree with the opinion of Mathew, J., that *Taylor* v. *Gillott* (1) governs the present case. Here a legal term had been created out of the original lease, and that term had vested in the defendant. A surrender at common law is a voluntary act, and if the original lease had been surrendered in the ordinary manner, by the operation of a modern statute, 8 & 9 Vict. c. 106, s. 9, the plaintiffs would have become entitled to a reversion expectant upon the defendant's lease. In *Taylor* v. *Gillott* (1) only an agreement had been drawn up in favour of the under-lessee. A disclaimer having been executed, the original term was thereby surrendered. The intended lessee filed a bill in the Court of Chancery to compel the original lessor to execute a lease to him. I do not think the lessor could be compelled to carry out the contract of the lessee. No obligation existed upon the lessor, the estate of the lessee was entirely gone. I think that the Vice-Chancellor properly refused to stay the action of ejectment, and rightly dismissed the bill. The two cases are distinguishable. I think the reasoning of the Lord Chancellor and Lords Justices in *O'Farrell* v. *Stephenson* (2) irresistible.

Judgment reversed.

Solicitors for plaintiffs: *Walters, Deverell, & Walter.*
Solicitor for defendant: *W. H. Herbert.*

J. E. H.

---

(1) Law Rep. 20 Eq. 682.

(2) 4 Ir. L. Rep. 715.

[IN THE COURT OF APPEAL.]

1881
April 12.

EATON *v.* BASKER AND OTHERS AND THE MAYOR, ALDERMEN, AND BURGESSES, OF THE BOROUGH OF GRANTHAM.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 174, 200—*Urban Authority—Contract exceeding* 50*l. in Value or Amount not under Seal—Corporation.*

11 QBD 231

Sect. 174 of the Public Health Act, 1875, which directs a contract, made by an urban authority to be under their common seal, if "the value or amount exceeds 50*l.*," applies only to a contract, to which the parties at the time of entering into it contemplate that it shall exceed that sum.

Scarlet fever having broken out, an urban sanitary authority appointed a committee under s. 200 of the Public Health Act, 1875. A medical man agreed verbally with the committee on behalf of the urban sanitary authority, to attend the patients at the rate of 5*s.* 3*d.* per tent per day, and attended until the amount due was nearly 100*l*:—

Held, affirming the judgment of Stephen, J., that the committee men were not liable to pay the medical man; but

Held, reversing the judgment of Stephen, J., that although more than 50*l.* became due, it was not a contract "whereof the value or amount exceeds 50*l.*" within the meaning of the Public Health Act, 1875, s. 174, because at the time of entering into it, the parties had not ascertained that it would exceed 50*l.*, and that the urban sanitary authority were liable to the medical man.

APPEAL by the plaintiff from the judgment of Stephen, J., after the trial.

The facts of the case are fully stated in the judgment of Stephen, J., (1) and it is here necessary only to give the following summary of them.

An outbreak of scarlet fever having occurred at Grantham, three urban sanitary authorities nominated committees, which were amalgamated into a single committee for the purpose of providing hospitals to receive the fever patients. The rural sanitary authority of the Grantham Union also nominated a committee of two persons to confer with the others. Subsequently the three urban sanitary districts were amalgamated into the borough of Grantham, and the corporation of Grantham became subject to the liabilities of the three districts. The committees thus formed erected tents for the reception of the patients, and agreed with the plaintiff, a medical man, that he should attend the patients at the rate of 5*s.* 3*d.* a tent per day. The plaintiff entered upon this employment, and his charges at the rate aforesaid came to 97*l.* 7*s.* 9*d.* The defendants in this action were the committeemen and the corporation of Grantham.

---

(1) 6 Q. B. D. 201.

Stephen, J., gave judgment (1) for the committeemen, on the ground that the contract for the plaintiff's attendance was made with the committeemen not in their individual capacity, but in their capacity as a committee, and for the corporation of Grantham on the ground that the contract was not under the common seal of the corporation, pursuant to the provisions of the Public Health Act, 1875, s. 174, sub-s. 1. (2)

Finlay, for the plaintiff. There was not one contract for attending the patients at the tents, but several. But even if there was one contract, it was not a contract, "whereof the value or amount exceeds 50*l.*" within the meaning of the Public Health Act, 1875, s. 174, sub-s. 1, for at the time it was entered into, it could not be foreseen whether the plaintiff would earn more than 50*l.* by his services as a medical man. The corporation therefore are liable for the whole amount, although as they are responsible to the plaintiff it may be difficult for him to obtain judgment likewise against the committeemen.

Lawrance, Q.C., and *J. S. Dugdale,* for the defendants. As the contract for the plaintiff's services was not entered into under the common seal of the corporation of Grantham, they are not liable, since the plaintiff claims a sum exceeding 50*l.*: *Hunt* v. *Wimbledon Local Board.* (3)

[LUSH, L.J. In the present case, at the time when the contract was entered into, it was not contemplated that the debt to become due from the corporation to the plaintiff would necessarily exceed 50*l.*]

---

(1) 6 Q. B. D. 201.

(2) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 173, "any local authority may enter into any contracts necessary for carrying this Act into execution."

Sect. 174. "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed (namely):

"(1.) Every contract made by an urban authority, whereof the value or amount exceeds 50*l.* shall be in writing, and sealed with the common seal of such authority."

(3) 4 C. P. D. 48.

There was but one contract to pay the plaintiff 97*l.* 7*s.* 9*d.*: *Baldey* v. *Parker* (1), a case decided upon the Statute of Frauds, s. 17, and cited in Benjamin on Sales, book 1, part 2, ch. 3, p. 106 (2nd edit.). The value or amount of the contract may be ascertained, either when it is entered into, or when it has come to an end.

At all events the contract is void by the common law, inasmuch as it was not made under the common seal of the corporation; and the employment of the plaintiff, as a medical man, was not one of those trivial matters, as to which a corporation can bind itself by a verbal contract: *Church* v. *Imperial Gas Light and Coke Co.* (2), 1 Lindley on Partnership, book 2, ch. 1, s. 6, p. 352 (4th edit.).

Finlay, was not called upon to reply.

BRAMWELL, L.J. The judgment of Stephen, J., cannot be maintained. The question is whether the contract for the plaintiff's attendance as a medical man at the time of making it exceeded in value 50*l.* The Public Health Act, 1875, s. 174, sub-s. 1, enacts: "Every contract made by an urban authority, whereof the value or amount exceeds fifty pounds, shall be in writing and sealed with the common seal of such authority." The legislature has not used the words "shall exceed" or "may exceed:" it has used the present tense: the words "at the time of making it" must be read into the enactment. I think that there was not a separate contract for each day's service; the contract was, that so long as the service of the plaintiff as medical man lasted, he should be paid 5*s.* 3*d.* per day, per tent: it was one contract extending over the whole period of service, and the value of it might, and actually did, exceed 50*l.*; but the value of it did not necessarily exceed 50*l.* at the time of entering into it; the outbreak of scarlet fever might have ceased, or the plaintiff might have withdrawn his services and might have discontinued his attendance upon the patients. The plaintiff was not bound to give his services during the whole of the outbreak, and the defendants were not bound to employ him. The contract sued

---

(1) 2 B. & C. 37; per Holroyd, J., at pp. 42, 43.

(2) 6 Ad. & E. 846, at pp. 860, 861, 862.

1881

EATON
v.
BASKER.

upon is not within the enactment relied on. I cannot agree with the reasoning of Stephen, J., and, to illustrate my meaning, I may quote the following passage from his judgment (1): "An attempt was made to shew that the contract was not one of which 'the value or amount exceeded 50*l.*' when it was made, as it was a contract for 5*s.* 3*d.* per tent, per day, but I think that it became a contract, the value or amount of which exceeded 50*l.*, as soon as the amount due to Mr. Eaton exceeded 50*l.*" Suppose that when the plaintiff had earned 20*l.*, he had demanded payment of that sum; surely he would have been entitled to claim it, and the value of the contract would not have amounted to 50*l.* It has occurred to me that it may be said that the statute has directed certain contracts to be in writing under seal, but has not permitted all other contracts to be made verbally, and therefore that the rule of the common law applies which forbids a corporation to contract, except under its common seal. I think that I sufficiently dealt with that argument in *Hunt* v. *Wimbledon Local Board* (2); but I will assume the argument to be just. I am prepared to hold that the employment of the plaintiff was such a contract as a corporation might lawfully enter into by word of mouth, and, therefore, even if the rule of the common law is not excluded by ss. 173, 174 of the Public Health Act, 1875, it will not prevent the contract between the plaintiff and the corporation from taking effect; it related to a small matter, and was valid although it was not entered into by deed. The corporation of Grantham are therefore liable in the present action, and the judgment of Stephen, J., in their favour must be reversed, and judgment must be entered against them for the full amount claimed. I think, however, that there is no case against the members of the committee, and the judgment in their favour must be sustained. If the plaintiff had failed against the corporation, possibly he might have had some remedy against the committeemen for representing that they were invested with an authority which they did not in fact possess; but in the view which we take, the question does not arise.

BAGGALLAY, L.J. As to the committeemen I think that the appeal fails. I agree with Stephen, J., that they were not personally liable upon the contract sued upon. As to the main points in the case I agree with the reasons of Bramwell, L.J., but I wish to say that I rather think that the rule of the common law is excluded by ss. 173, 174.

---

(1) 6 Q. B. D., at p. 206.

(2) 4 C. P. D. 48, at p. 52.

LUSH, L.J. I think that the judgment in favour of the corporation of Grantham cannot be sustained. The question depends upon the words of s. 174. In order to come within the words of the enactment, the contract must be one of which the value exceeds 50*l.* at the time when it is entered upon. The case before us is very analogous to those relating to contracts not to be performed within a year, and decided upon s. 4 of the Statute of Frauds. In order to bring a contract within the provisions of that enactment, it is not enough that the performance of the contract lasts for more than a year: it must be shewn that at the time when it was made, it was incapable of being performed within a year. In *Hunt* v. *Wimbledon Local Board* (1), it must be taken that it was known by all parties that the plans would cost more than 50*l.* In the present case it was not known at the time when the contract was entered into, how long it would be necessary to employ the plaintiff as a medical man, or how much his charges might amount to. His employment depended upon the continuance of the outbreak of fever. I therefore think that the value or amount of the contract between the plaintiff and the corporation did not exceed 50*l.* within the meaning of the Public Health Act, 1875, ss. 173, 174.

Judgment as against the committeemen affirmed, as against the corporation of Grantham reversed.

Solicitors for plaintiff: *Routh, Stacy, & Castle, for H. Thompson & Sons, Grantham.*

Solicitors for defendants: *Bolton, Smith, & Co., for H. Beaumont, Grantham.*

---

(1) 4 C. P. D. 48.

J. E. H.

1881
May 20.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* WHITCHURCH.

Practice — Appeal — Court of Appeal — Jurisdiction — "Criminal Cause or Matter"—Supreme Court of Judicature Act, 1873 (36 & 37 *Vict. c.* 66), s. 47—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 92, 94.

8QBD153

An order was made by justices directing the defendant to fill up an ashpit, so as to be no longer a nuisance. The Queen's Bench Division made absolute an order for a certiorari to quash this order, on the ground that it was not warranted by the Public Health Act, 1875, ss. 94, 96:—

Held, that the order of the justices was made in a "criminal cause or matter" within the meaning of the Supreme Court of Judicature Act, 1873, s. 47, and that an appeal from the judgment of the Queen's Bench Division could not be entertained.

Mellor v. *Denham* (5 Q. B. D. 467) followed.

APPEAL by justices from an order of Pollock, B., and Stephen, J.

By a notice issued under the provisions of the Public Health Act, 1875, the town council of the borough of Nottingham, being the urban sanitary authority under the Act for the district of the borough, being satisfied of the existence of a nuisance at certain premises in the said borough, arising from an offensive ashpit and privy, required the defendant, C. J. Whitchurch, within seven days from the service of the notice to abate the same, and for that purpose to fill up the ashpit, abandon the privy, and build a pail closet.

Complaint was afterwards made before justices by the inspector of nuisances for the urban sanitary district of the borough that on the said premises whereof C. J. Whitchurch was the owner within the meaning of the Public Health Act, 1875, a nuisance existed, namely, a privy and ashpit in such a state as to be a nuisance, and that the nuisance was caused by the default of Whitchurch. A summons was issued and came on for hearing in the ordinary way.

The justices, on the evidence before them, being of opinion that a nuisance existed on the premises, and that the local authority had proved all that was necessary to be proved, made an order upon Whitchurch "to fill up the said ashpit, to abandon the said privy, and to construct a proper and sufficient pail closet in lieu thereof, so that the same shall no longer be a nuisance as aforesaid."

The Queen's Bench Division (Pollock, B., and Stephen, J.) made absolute an order for a writ of certiorari to quash the order of the justices. (1)

The justices appealed.

May 19. *D. French*, for the defendant, C. J. Whitchurch. There is a preliminary objection to the hearing of this appeal. The order of the justices was made in a "criminal cause or matter" within the meaning of the Supreme Court of Judicature Act, 1873, s. 47, and no appeal will lie from the decision of the High Court of Justice. The sections of the Public Health Act, 1875, beginning at s. 91, relate to criminal matters and to the procedure for preventing them from being committed. The notice was issued under s. 94, and the summons to appear under s. 95. The order of the justices was made under s. 96, and under the provisions of that section a fine might have been inflicted which would have been enforceable as a penalty. *Mellor* v. *Denham* (2) is in point, and is a decisive authority to shew that this appeal cannot be heard. (3)

Philbrick, Q.C. (*George L. Denman* with him), for the justices. The order made by the justices was not a proceeding in a "criminal cause or matter." It is true that they might have fined the defendant; but they have adopted the alternative remedy and have simply ordered him to abate the nuisance.

[BRETT, L.J. Suppose that a fine had been imposed by the justices: could this case have been distinguished from *Mellor* v. *Denham?* (2)]

Perhaps not; but the order to abate is of a civil nature, and therefore an appeal will lie from the decision of the High Court making absolute the order for a certiorari.

---

(1) 6 Q. B. D. 545, sub nomine *Ex parte Whitchurch.*

(2) 5 Q. B. D. 467.

(3) *French* also contended that the order making absolute the order for the certiorari was made on an appeal from an inferior Court within the meaning of the Supreme Court of Judicature Act, 1873, s. 45, and that as no special leave to appeal had been given by the High Court, the present appeal could not be heard; but owing to the view taken by the Lords Justices as to the effect of s. 47, it is unnecessary to further notice the argument as to s. 45.

May 20. The following judgments were delivered:—

BRAMWELL, L.J. In this case it is unnecessary to trouble the counsel for the defendant to reply. The difficulty consists in applying the word "criminal" to the act, which the person charged before the justices is alleged to have done; his conduct was not such as is ordinarily called "criminal": but I cannot see why this is not a "criminal cause or matter," within the meaning of the Supreme Court of Judicature Act, 1873, s. 47. I think that the case before us is governed by *Mellor* v. *Denham* (1), and that we are bound by that decision. I confess that I had some doubt when we gave judgment in that case, and that I have not a confident opinion; nevertheless, I think that I should decide it in the same manner if it were brought before us de novo. The provisions of the Public Health Act, 1875, have been enacted as a general law for the good of the public. When a nuisance exists and notice of it is given to the owner to abate it, he is bound to execute such works as may be necessary for that purpose. When a notice to abate has been served under the Public Health Act, 1875, s. 94, the effect is the same as if the abatement had been directed by statute; the notice to abate is an act done for the common weal and benefit; and if no mode of enforcing it were pointed out by the statute, disobedience to it would be a misdemeanour at common law punishable by fine and imprisonment (2); in this event the disobedience would be undoubtedly criminal. The procedure, however, is somewhat altered, and instead of being fined and imprisoned at the discretion of the Court, the offender is liable to be fined to a limited amount, and not to be imprisoned if he pays the fine. Why is not this proceeding under the Public Health Act, 1875, "a criminal cause or matter," within the meaning of the Supreme Court of Judicature Act, 1873, s. 47? It is certainly not a civil proceeding, and it may perhaps be said that every proceeding is either civil or criminal. Therefore, independently of authority, I am disposed to hold that this is a "criminal cause or matter." The difficulty arising in this case exists in others independently of the statute; an indictment for the want of repair of a highway against a person bound to repair it ratione tenuræ is a criminal matter; and if the person indicted is convicted, he may be fined by the Court. Take the case of an indictment for a nuisance at common law; the defendant may bonâ fide believe that the acts complained of do not amount to a nuisance, or that if a nuisance does really exist, it is not of such a character as to induce the law to interfere and put it down; nevertheless, upon conviction he may be fined and imprisoned. Again, many of the offences mentioned in s. 91 of the Public Health Act, 1875, are nuisances at common law; some are not. Suppose that a man is charged with one of those offences which are nuisances at common law; proceedings against him may be taken at common law, and then he is assuredly a criminal; but proceedings may be taken under the statute; and in that case he is equally a criminal. The same rule must apply as to all offences against the Public Health Act, 1875, s. 91, whether they are or are not nuisances at common law, and the nature of the proceedings must in all cases be the same.

---

(1) 5 Q. B. D. 467.

(2) See *Reg.* v. *Walker*, Law Rep. 10 Q. B. 355.

Upon general principles of law, and upon the authority of *Mellor* v. *Denham* (1), I am of opinion that the case before us relates to a "criminal cause or matter," and therefore that no appeal can be brought before us from the decision of the High Court.

Brett, L.J. I am of opinion that we have no jurisdiction to entertain this appeal, because the legislature has treated the matter as criminal. By the Public Health Act, 1875, certain things are prohibited, and certain other things are directed to be done by the owners or occupiers; and it has been enacted that if a default occurs, the person in default shall be subject to a penalty recoverable before justices by Jervis's Acts. The legislature has decreed that a penalty shall be imposed upon a person offending against the provisions of the Public Health Act, 1875; and it has been decided in *Mellor* v. *Denham* (1) that to treat the matter in that manner is to treat it as a criminal matter. That decision, if it is applicable to the facts before us, is binding upon us; but

---

(1) 5 Q. B. D. 467.

I may venture to say that the view there taken of the law is right. It follows that this is a "criminal cause or matter" within the meaning of the Supreme Court of Judicature Act, 1873, s. 47. It is alleged that the power to impose a penalty does not turn the wrongful act into a crime, because an alternative remedy is given, namely, an order to abate or prohibiting the recurrence; but I cannot think that an alternative remedy alters the nature of the offence. I think that the present case is decided by *Mellor* v. *Denham.* (1)

COTTON, L.J. The only question necessary for our decision is whether this case is governed by *Mellor* v. *Denham* (1), and I think that it is within the authority of that decision. The only distinction between the two cases is that in the present case the justices had power to adopt an alternative mode of proceeding; but the justices might have imposed a penalty, and until the summons had been disposed of, no one could tell what order would be made or what penalty would be inflicted. The offence was equally criminal, whatever was the form of order made by the justices. The summons was a proceeding in a criminal matter.

Appeal dismissed.

Solicitors for justices: *Hughes, Hooker, Buttanshaw, & Thunder, for S. G. Johnson, Nottingham.*

Solicitors for defendant: *Taylor, Hoare, & Taylor, for Hume & Williams, Nottingham.*

---

(1) 5 Q. B. D. 467.

J. E. H.

1881
May 20.

[IN THE COURT OF APPEAL.]

THE GUARDIANS OF THE FULHAM UNION, APPELLANTS;
THE GUARDIANS OF THE ISLE OF THANET UNION, RESPONDENTS.

10 QBD 17

Poor Law—Settlement by Residence—Penitentiary—"Bonâ fide Charitable Gift"—54 *Geo.* 3, *c.* 170, *s.* 6—9 *&* 10 *Vict. c.* 66, *s.* 1—39 *&* 40 *Vict. c.* 61, *s.* 34.

A pauper had resided for upwards of three years in a building in the parish of F., occupied as a home or reformatory for women. This home was supported by money collected at church offertories without the parish, and by annual subscriptions and donations from persons resident in all parts of the kingdom; the money being applied in providing for the supervision, instruction, maintenance, and clothing of the inmates. The pauper during the whole term paid no money for her maintenance and clothing:—

Held, affirming the judgment of the Queen's Bench Division, that the money collected for her maintenance in the home was a "bonâ fide charitable gift," and that she had not been maintained by a rate or subscription raised in a parish in which she did not reside, within the meaning of the proviso to 9 & 10 Vict. c. 66, s. 1, and that she was irremovable from and settled within the parish of F., under 39 & 40 Vict. c. 61, s. 34.

APPEAL by the Guardians of the Fulham Union from the judgment of the Queen's Bench Division (Field and Manisty, JJ.), upon a case stated under 12 & 13 Vict. c. 45, s. 11.

The facts are fully stated in the report of the proceedings in the Queen's Bench Division (1), and it is unnecessary to repeat them here.

Arthur Charles, Q.C., and *Poland*, for the guardians of the Fulham Union. It is enacted by 54 Geo. 3, c. 170, s. 6 (2) that residence in a charitable institution shall not confer a settlement. This statute was not brought under the attention of the Queen's Bench Division. It has not been expressly repealed, and it is submitted that it has not been by implication repealed by 39 & 40 Vict. c. 61, s. 34. As it is still in force, it is an express legislative direction that residence like that of the pauper in the present case, shall not confer a settlement. Further, whilst the pauper was in the home, she wholly was maintained by a rate or subscription raised in a parish in which she did not reside, within the meaning of the proviso to 9 & 10 Vict. c. 66, s. 1, for the fund, out of which she was supported, was made up of moneys collected throughout the kingdom, and the contributions were not a "bonâ fide charitable gift" within the meaning of the same enactment, for they were made to the institution and not to the pauper herself.

---

(1) 6 Q. B. D. 610.

(2) By 54 Geo. 3, c. 170, s. 6, "No person or persons shall gain any settlement in any district, parish, township, or hamlet, by reason of any residence in any house or other dwelling-place provided for the residence of such person or persons by any charitable institution, while such person or persons shall be supported and maintained at the expense of such charitable institution, as an object or objects of such charity."

By the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict c. 61), s. 34: "where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise."

Prosser, for the guardians of the Isle of Thanet Union, was not called upon to argue.

BRAMWELL, L.J. This seems to me a very plain case. I may say that I entirely concur with the view of Manisty, J., whilst I do not dissent from that of Field, J. I think that the words in s. 1 of 9 & 10 Vict. c. 66, "shall be wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside," are intended to apply to a case where persons residing in one parish make a rate or subscription amongst themselves for the relief of a pauper in another parish. I think that this language of the enactment is explained by the subsequent words "not being a bonâ fide charitable gift." The case as to this point is too plain for argument.

As to the new point that has been argued in this Court, I think that the best way of examining the question is to look at it retrospectively. By 39 & 40 Vict. c. 61, s. 34, residence for three years, under such circumstances as to render a person irremovable, will confer a settlement. Irremovability is created by residence, unless the proviso of 9 & 10 Vict. c. 66, s. 1, is brought into operation by the existence of some of the incidents therein mentioned. It is true that by 54 Geo. 3, c. 170, s. 6, it is enacted that no person shall gain a settlement by reason of residence in a house provided by any charitable institution, but under subsequent statutes residence of that kind renders a pauper irremovable, and now three years' irremovability confers a settlement. I do not think that it is correct to say that 54 Geo. 3, c. 170, s. 6, is repealed by implication. Residence confers irremovability which in its turn creates a settlement. Three years' irremovability now constitutes a new head of settlement.

I think that this appeal must be dismissed.

BRETT, L.J. I also am of opinion that the appeal must be dismissed. I agree with the view of Manisty, J.; the language of 9 & 10 Vict. c. 66, s. 1, points to a subscription raised in one parish, and not as in the present instance to a subscription collected at church offertories throughout Middlesex, and from various persons resident in all parts of the kingdom. Mr. Charles cannot maintain his argument without inserting after the words in the proviso to 9 & 10 Vict. c. 66, s. 1, "not being a bonâ fide charitable gift;" the additional words "to him or to her:" as these words are not to be found, the case seems to me to be plain.

As to the new point which has been argued before us, I cannot but think that the earlier Act, 54 Geo. 3, c. 170, s. 6, has been repealed by the later, 39 & 40 Vict. c. 61, s. 34. The two acts are inconsistent. The earlier Act provides that residence under certain circumstances shall not give a settlement, whilst the latter Act directs that residence under the same circumstances shall create a settlement.

COTTON, L.J. I will put aside for the moment the consideration of 54 Geo. 3, c. 170, s. 6.

Two questions arise for our decision upon the construction of the proviso in 9 & 10 Vict. c. 66, s. 1. The first is whether the pauper has been maintained wholly or in part by a rate or subscription raised in a parish in which she did not reside. It has been in effect argued that the words of the statute apply to any fund raised by subscriptions or rates collected anywhere out of the parish in which a pauper resides; but I think that the language used by the legislature points to parochial rates or subscriptions. In the present case the subscriptions for supporting the inmates of St. James's Home were not raised by parochial rates, but by contributions collected throughout the kingdom. The second question is whether these contributions are a "bonâ fide charitable gift;" I think that they are, for we are not at liberty to introduce words into the statute; we cannot insert the words "to the pauper." It may be that the subscriptions are a gift to the home, but they are also a gift to the inmates.

Then as to the question arising under 54 Geo. 3, c. 170, s. 6, I have to remark that that statute did not deal with irremovability. Under subsequent enactments residence does create irremovability, and when a pauper has been irremovable for three years he gains a settlement. The present state of the law seems inconsistent with that which formerly existed, and it may be that 54 Geo. 3, c. 170, s. 6, has been repealed by 39 & 40 Vict. c. 61, s. 4.

Appeal dismissed.

Solicitors for appellants: *Rexworthy, Oswell, & Co.*
Solicitors for respondents: *Paterson, Snow, & Bloxam.*

J. E. H.

June 21.

THE QUEEN *v.* MOORE, AND OTHERS, JUSTICES OF HERTFORDSHIRE.

Licensing Acts—Beerhouse—Licence—Authority to Owner of Premises to continue the Business, where the Occupier's Licence has been forfeited under s. 15 *of the Licensing Act,* 1874 (37 *&* 38 *Vict. c.* 49)—*Discretion of Justices.*

Where the occupier of a beerhouse has forfeited his licence by being guilty of an offence under s. 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), the grant by the petty sessions of an authority to the owner to carry on the business until the next special sessions for licensing purposes, is in the discretion of the justices, under ss. 1, 4, and 14 of the Licensing Act, 1828 (9 Geo. 4, c. 61); and the person applying for such authority is not entitled to notice under s. 42 of the Act of 1872 (35 & 36 Vict. c. 94) of the objections intended to be urged against his application.

CHARLES PARSLEY, the tenant of a beerhouse called the Joiners' Arms, at Cholesbury, near Tring, Herts, having been convicted of felony, his licence, by virtue of s. 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), became forfeited; and the owner of the house (the brewer) applied at a petty sessions held on the 20th of April, 1881, to have the licence transferred to a new tenant. But, there being no proof of the conviction of Parsley, the application was adjourned until the special transfer sessions to be held on the 11th of May; on which occasion evidence was given before the magistrates, without any previous notice thereof to the applicant, that the house had been badly conducted; and they, acting upon that evidence, and deeming from its local position (on the border of another county where the hours of closing were different) that it was unfit for a licensed beerhouse, rejected the application.

A rule was obtained calling upon the justices to shew cause why they should not forthwith hold a special licensing sessions for the purpose of re-hearing the application; one of the objections to their proceedings being that they had improperly received evidence impugning the character of the house, without notice thereof to the applicant, as required by s. 42 of the Licensing Act, 1872 (35 & 36 Vict. c. 94).

Horace Brown, shewed cause. The substantial question here is whether the justices had a discretion to grant or to refuse the licence or authority applied for. Under the Licensing Act, 1828, (9 Geo. 4, c. 61), ss. 1, 4, and 14, their discretion is not limited to the fitness of the person applying, or the suitableness of the premises for the purposes of a licensed house, but is to be exercised also with reference to the nature and requirements of the locality and other circumstances: *Reg.* v. *Lancashire Justices* (1); *Reg.* v. *Rowell.* (2) And there is nothing in s. 15 of the Act of 1874 (37 & 38 Vict. c. 49) which at all limits that discretion. The object of the last-mentioned enactment simply is, to enable the owner of licensed premises, whose tenant has forfeited his licence by being guilty of one of the offences therein enumerated, to apply to the justices in petty sessions for authority to carry on the business on the same premises until the next special sessions for licensing purposes, and at those sessions to make a further application for the grant of "a licence in respect of such premises." The justices are not bound to grant either the limited and temporary authority or the subsequent licence.

W. Wightman Wood, contrà. By the interpretation-clause (s. 74) of the Licensing Act of 1872, a "Licence" means a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act, 1828 (9 Geo. 4, c. 61); "the renewal of a licence" means a licence granted at a general annual licensing meeting by way of renewal; "the transfer of a licence" means a transfer made in special sessions in exercise of the power granted to justices by the 4th section of 9 Geo. 4, c. 61: and by s. 32 of the Licensing Act, 1874, "a new licence" means a licence for the sale of any intoxicating liquor granted at a general licensing meeting in respect of premises in respect of which a similar licence has not theretofore been granted. The licence or authority now under consideration does not fall within either of these definitions: it is an exceptional licence to be granted under exceptional circumstances,—to enable the owner of the premises, whose tenant has forfeited his licence for one of the causes there specified, to carry on the business until the next special sessions for licensing purposes, when he may apply for "a licence." By s. 4 of 9 Geo. 4, c. 61, which is the section referred to in s. 15 of the Act of 1874, the discretion of the justices is limited to the fitness of the *person* proposed to be licensed. The question in *Reg.* v. *Lancashire Justices* (1) turned upon s. 1 of 9 Geo. 4, c. 61, and the application was made at the general annual licensing meeting, where the justices have a larger discretion. Sect. 9 of the same Act provides that, "when (at any of the meetings aforesaid) any question touching the granting, withholding, or transferring any licence, or the fitness of the person applying for such licence or of the house intended to be kept by such person, shall arise, such question shall be determined by the majority of justices present when such question shall arise," &c. A licence once granted is to be in force for one year: 9 Geo. 4, c. 61, s. 13: and, unless forfeited for an offence against the Acts, is not to be put in jeopardy except at a general licensing meeting: *Reg.* v. *Rowell.* (2) The only expiration contemplated is by effluxion of time. That is the general policy of the Act.

---

(1) Law Rep. 6 Q. B. 97.

(2) Law Rep. 7 Q. B. 490.

[STEPHEN, J.:—Sect. 15 of the Act of 1874 and s. 14 (and perhaps s. 4) of 9 Geo. 4, c. 61 are the only material sections to be referred to. By s. 15 of the Act of 1874 the owner may, under the circumstances which have arisen here, apply for authority to carry on the business until the next special sessions. Sections 4 and 14 of 9 Geo. 4, c. 61 apply to his case. Those sections give a discretion to the justices in terms as to the fitness of the person applying, and as to the place by the words "it shall be lawful."]

---

(1) Law Rep. 6 Q. B. 97.

(2) Law Rep. 7 Q. B. 491.

The only grounds upon which a licence can be withheld by the justices are those mentioned in s. 8 of 32 & 33 Vict. c. 27,—1. that the applicant has failed to produce satisfactory evidence of good character,—2. that the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character,—3. that the applicant having previously held a licence for the sale of wine, &c., the same has been forfeited for his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licence or from selling any of the said articles,—4. that the applicant, or the house in respect of which he applies, is not duly qualified as by law required. Is one who wants a mere temporary authority to carry on a business for a limited time to be in a worse position than one who wants a new licence?

Sect. 42 of the Act of 1872 provides that, where a licensed person applies for the renewal of his licence, the following provisions shall have effect (inter alia),—"The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered as if the notice hereinbefore prescribed had been given." No notice was given here. A man is not to be deprived of a valuable property without having had an opportunity of defending himself.

[GROVE, J. That section applies only to renewals, and where an objection is made by an objector; not to a case like this, where the justices have an absolute discretion, the licence having been forfeited by the misconduct of the person licensed.]

GROVE, J. I am of opinion that this rule should be discharged. The substantial question turns upon the construction of s. 15 of the Licensing Act, 1874, 37 & 38 Vict. c. 49, which enacts that, "where any licensed person is convicted for the first time of any one of the following offences,—1. making an internal communication between his licensed premises and any unlicensed premises,—2. forging a certificate under the Wine and Beerhouse Acts, 1869 and 1870,—3. selling spirits without a spirit licence,—4. any felony; and in consequence either becomes personally disqualified or has his licence forfeited, there may be made by or on behalf of the owner of the premises an application to a court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises; and for this purpose the provisions contained in the Intoxicating Liquor Licensing Act, 1828, with respect to the grant of a temporary authority and to the grant of licences at special sessions, shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee." Prior to the passing of that Act, the power to make such an application did not exist. The object of the enactment was to enable the owner to apply for leave to carry on the business in order that he might not suffer from the misconduct of his tenant. It is simply a provision to enable the owner to make the application. It says nothing as to what the justices shall do: that is left to their discretion under the Act of 1828, 9 Geo. 4, c. 61. If they think that the person seeking to be authorised to carry on the business is a fit and proper person, and that the house is a fit and proper house to be licensed, they may grant the leave; if they think otherwise, they may withhold it. That the justices have this discretion is expressly decided in *Reg.* v. *Lancashire Justices.* (1) And there is nothing in the Act of 1874 to take it away. With regard to the objection that no notice was given under s. 42 of the Act of 1872, if the whole of that section be read it will be seen at once that it applies only where an objection is taken to the renewal of a licence, and not to a case like this, where the licence has been forfeited, and the magistrates in their discretion see fit to withhold the authority to carry on the business under the provision in s. 15 of the Act of 1874. I think they had full and absolute discretion to refuse the application, and that the applicant had no right to notice of the objections to be urged against him. The rule must be discharged.

---

(1) Law Rep. 6 Q. B. 97.

LINDLEY, J. I am of the same opinion. The question really turns upon s. 15 of the Act of 1874, and s. 14 of 9 Geo. 4, c. 61. Sect. 15 of the Act of 1874 confers upon the owner of licensed premises power to apply for a limited authority to carry on the business, where his tenant has forfeited the licence by committing one of the offences mentioned in that section. This throws us back to the Act of 1828, the 1st, 4th, and 14th sections of which give the magistrates a discretion in every case of an application for a licence or a renewal of a licence, not only as to the fitness of the person applying, but also as to the more general matters mentioned in *Reg.* v. *Lancashire Justices* (1), I think it would be far too narrow a construction of the Acts to hold that the justices have less discretion under s. 15 of the Act of 1874 than they unquestionably have under s. 14 of 9 Geo. 4, c. 61.

STEPHEN, J. I am of the same opinion. This case turns entirely upon the construction of s. 15 of the Act of 1874 and s. 14 of 9 Geo. 4, c. 61. The last-mentioned section provides for five cases in which it shall be lawful for the justices to grant a temporary licence,—where a person duly licensed shall before the expiration of such licence die or shall be by sickness, &c., rendered incapable of keeping an inn,—where the person licensed shall become bankrupt,—where the person licensed, or his heirs, &c., shall remove or yield up possession,—where the occupier, being about to quit shall have wilfully omitted or neglected to apply at the proper time for a licence, or where the house is about to be pulled down or occupied under the provisions of an Improvement Act, or shall be by fire or tempest, &c., rendered unfit for the reception of travellers; such licence to continue in force until the next licensing day. These are supplemented by other cases in s. 15 of the Act of 1874. But the last-mentioned section contains nothing to take away the discretion which the justices had under the earlier enactment. As to the notice, I agree with my Brother Grove.

---

(1) Law Rep. 6 Q. B. 97.

LINDLEY, J. I also agree that s. 42 of the Act of 1872 does not apply to this case.

Rule discharged.

Solicitor for appellant: *A. W. Vaisey, Tring.*

Solicitors for respondents: *Grover & Son, Hemel Hempstead.*

J. S.

WILSON *v.* STRUGNELL.

July 2.

Municipal Corporation—Municipal Corporations Act (5 & 6 *Wm.* 4, *c.* 76), *s.* 57—*Borough without Commission of Peace—Mayor a Justice of the Peace for Borough—Recognizance by Bail for Appearance of Accused—Money paid by Accused to Bail as Indemnity—Contract contrary to Public Policy.*

The mayor of a borough, without a commission of the peace, before whom a person was brought charged with embezzlement, remanded the accused to the next meeting of the justices of the peace for the county in which the borough was situated, and admitted him to bail, taking the recognizance of the defendant in 100*l.* for the appearance of the accused. The accused paid to the defendant 100*l.* to indemnify him against liability under the recognizances. The accused did not appear before the county justices, who, not recognizing the authority of the mayor to remand prisoners for appearance before the County bench, took no steps on the information preferred before him, but proceeded on a fresh information, and issued a warrant against the accused which was not executed. It did not appear that the defendant's recognizance had been either forfeited or discharged or that he had paid anything under it. The accused having been adjudicated bankrupt, the plaintiff, as trustee, sued to recover the 100*l.* from the defendant:—

Held (by Stephen, J.), that, by s. 57 of the Municipal Corporations Act, the mayor was a justice of the peace for the borough, and the recognizance was valid; that the 100*l.* was paid to the defendant in pursuance of a contract which was contrary to public policy, but that the contract had not been executed, and therefore the plaintiff was entitled to recover.

FURTHER CONSIDERATION.

This was an action by the trustee of a bankrupt to recover the sum of 100*l.* paid by the bankrupt to the defendant under the circumstances detailed in the judgment.

June 25. *Atherley-Jones*, for the plaintiff.
J. A. Foote, for the defendant.

Cur. adv. vult.

July 2. STEPHEN, J. This was an action tried before me in Middlesex on the 12th of May, 1881, and heard on further consideration on the 25th of June.

The facts were as follows:—Manners was charged on the 27th of September, 1879, before the mayor of Shaftesbury with embezzlement, and was by him remanded to appear before the county magistrates sitting at Shaftesbury on the 30th. Manners was bound over to appear, and Strugnell gave bail to the extent of 100*l.* for his appearance. Strugnell received 100*l.* from Manners as security for becoming bail. On the 30th of September, Manners did not appear before the county magistrates. Shaftesbury is one of the boroughs in Schedule B of the Municipal Reform Act, and has a mayor, but no separate commission of the peace. The county magistrates do not recognise the right of the mayor to remand prisoners for appearance before the county bench. There was no evidence at all as to their having taken any step, in consequence of the non-appearance of Manners, with reference to the recognizances, but they received an information on oath against him, and issued a warrant for his apprehension. He has not since been heard of. On the 18th of May, 1880, Manners was adjudicated a bankrupt, and Wilson, the trustee in bankruptcy, sued Strugnell to recover from him the 100*l.* paid him by Manners.

The following were the points raised in the argument.

It was argued for the plaintiff, that the mayor of Shaftesbury had no power to take the recognizances, and that, therefore, the 100*l.* was paid without consideration, and could be recovered by Manners' trustee as money paid to his use. This was denied on the part of the defendant.

It was also argued for the plaintiff, that even if the recognizances were valid the contract to indemnify had failed, as it did not appear that that recognizance had been forfeited, and as it did appear that the first prosecution had been dropped, the county magistrates having instituted on their own account an entirely new one. To this the defendant replied that the burden of proving that the defendant was relieved from responsibility was on the plaintiff, and that he had failed to prove it. Further, however, it was alleged by the defendant that the contract was illegal, and that as the defendant was in possession of the money he was entitled to retain it, and to this the plaintiff replied that if the contract was illegal the plaintiff was entitled to recover the money, because the illegal consideration had not been executed, and that, at all events, his trustee in bankruptcy was so entitled whether he was or not.

I will dispose of these arguments successively.

In the first place I hold that the mayor of Shaftesbury was entitled to hold Manners to bail to appear before the county magistrates. By s. 57 the mayor of every borough in either schedule to the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, is entitled to be a justice of the peace of and for the borough, and though no separate commission of the peace has been given to Shaftesbury under s. 98, and all criminal jurisdiction vested in any corporate or chartered officer by any earlier law or charter is taken away by s. 107, and though the county justices have concurrent jurisdiction in the borough under s. 111, and though there is no evidence that the mayor of Shaftesbury is in the commission of the peace for the county of Dorset, I think that the terms of ss. 57 and 101 make the mayor a magistrate for the borough, and require him to act as such, nor do I understand the grounds on which it is said the country justices refuse to recognise his jurisdiction. I think, accordingly, that the recognizances were valid originally. In the second place it does not appear what has become of the recognizances, and whether they have or have not been indorsed under 11 & 12 Vict. c. 42, s. 21, or whether or not they have been dealt with in any, and if so in what, way under the Summary Jurisdiction Act, 42 & 43 Vict. c. 49, s. 9, does not appear. Hence there is no evidence to shew that the liability arising under the recognizances has been in any way discharged,

1881

WILSON
v.
STRUGNELL.

and this being so I must presume that it continues. In the third place I am of opinion that the contract to indemnify the bail against his liability was contrary to public policy, and therefore illegal and void. I should have been prepared to hold thus upon the obvious principle that the effect of the contract is to deprive the public of the security of the bail, but I think that the opinion of the Court in *Jones* v. *Orchard* (1) is a direct authority in favour of the view which I take, though the judgment of the Court in that case proceeded on another point.

The money, therefore, must be taken to have been paid to the defendant by Manners on an illegal consideration, and the question is whether under these circumstances Strugnell can keep it or Manners' trustee reclaim.

Before considering this question it seems to me essential to observe, that if the contract had been good and if the liability of the defendant had been determined, it is clear that Manners would have been entitled to recover the money. It was paid to Strugnell only to indemnify him against eventual loss, and if Manners had appeared in discharge of his recognizance he would have been entitled to recover his 100*l.*

I was referred to two classes of cases which have some degree of resemblance to each other (though I think they are really quite consistent and distinct) to each of which this case was attempted to be referred.

The defendant cited *Taylor* v. *Chester* (2) and some earlier cases. The plaintiff cited *Bone* v. *Ekless* (3) which has been followed by the case of *Taylor* v. *Bowers* (4) and also *Symes* v. *Hughes*. (5) Many other cases might be referred to, but I think that all of them are consistent and reducible to plain and familiar principles. The principle is that where money has actually been paid upon an immoral or illegal consideration fully executed and carried out, it cannot be recovered by the person who paid it from the person to whom it was paid; but that where money has been paid to a person in order to effect an illegal purpose with it, the person making

(1) 16 C. B. 614.

(2) Law Rep. 4 Q. B. 309.

(3) 5 H. & N. 925.

(4) 1 Q. B. D. 291.

(5) Law Rep. 9 Eq. 475.

the payment may recover the money back before the purpose is effected.

The question, therefore, in the present case appears to me to reduce itself to this. Has the arrangement made between Manners and Strugnell been executed or not? I think it has not. In one sense, no doubt, Strugnell is indemnified so long as he holds the 100*l.*, but it is only against any risk to which he is exposed by having become bail for Manners, that is to say, he has the means of repaying himself for any loss to which he may be put hereafter; but I do not think the matter can be said to have been fully completed until the sum has been actually and finally applied to the purpose of repaying him for a loss actually sustained by him. Till his recognizance is forfeited and the money applied to the payment of the sum for which he is liable, the transaction, as it seems to me, is still incomplete, and either Manners or his trustee (for I do not rely on any distinction between them) has a right to require the repayment of the money.

The result is that I give judgment for the plaintiff for 100*l.* and costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Kingsford & Dorman, for Hill & Slader, Salisbury,*

Solicitors for defendant: *Gregory, Rowcliffes, & Co., for J. Trevor Davies, Yeovill.*

A. M.

[IN THE COURT OF APPEAL.]

1881
July 27.

WILSON AND OTHERS, APPELLANTS; RAFFALOVICH AND ANOTHER, RESPONDENTS.

Practice—Production of Documents by Plaintiffs—Action brought in the Name of Third Parties.

8 QBD
164

Goods shipped by R. & Co. having been lost at sea, the underwriters, who had insured the cargo, paid R. & Co. for a total loss, and then commenced an action against the shipowners in the name of R. & Co. to recover the value of the goods. An order having been made by consent that the plaintiffs should make an affidavit stating what documents were in their possession relating to the matters in question in the action, and a further order having been made by the master in chambers that both members of the firm of R. & Co. should put in a further and better affidavit, the solicitor of the underwriters deposed that the members of the firm of R. & Co. were abroad, and would not give any further discovery, and that the real plaintiffs had done all they could do to comply with the order:—

Held, reversing the decision of the Queen's Bench Division, that the case must be treated as if the nominal plaintiffs on the record were suing for their own benefit, and that the making a further affidavit could not be dispensed with.

ACTION to recover the value of a quantity of wheat shipped by Raffalovich & Co., of Odessa, on board the ship *Alpha* belonging to the defendants. The ship was sunk in a collision near Constantinople, and the cargo lost. The underwriters who had insured the cargo paid Raffalovich and Co. for a total loss, and the bill of lading was handed over to them. They then commenced this action in the name of Raffalovich & Co. against the owners of the ship.

In answer to a notice calling on the plaintiffs to state who were the persons constituting the plaintiffs' firm, it was stated that they were Theodore Raffalovich and Gregoire Raffalovich, of Odessa.

On the 28th of July, 1880, an order was made "by consent" "that the plaintiffs do, within twenty-one days from the date of this order, answer on affidavit stating what documents are or have been in their possession or power relating to the matters in question in this action."

Theodore Raffalovich thereupon filed an affidavit and scheduled certain documents, and eventually, on the 20th of June, 1881, the master made an order that both the persons composing the plaintiffs' firm should make and file within fourteen days a further and better affidavit of documents. Upon appeal to Mathew, J., in chambers, this order was affirmed, and the plaintiffs appealed to the Divisional Court. In an affidavit by the solicitor for the plaintiffs, it was stated that he was acting for the underwriters, and had issued the writ in the name of Raffalovich & Co., on the ground that the underwriters had implied authority to use the name of the firm; that the deponent on inquiry was informed that Theodore Raffalovich was travelling on the continent, and that Gregoire Raffalovich, the other member of the firm, was an invalid and confined in an asylum at Paris. That a further affidavit of documents was prepared and forwarded to Theodore Raffalovich, who was sworn thereto, and the same was filed, Gregoire Raffalovich being unable to sign the same; that the nominal plaintiffs, having been paid as and for a total loss, declined to execute or sign any further documents in the matter, and the said underwriters were consequently unable to comply with the order of the 20th of June, but that he believed that the plaintiffs' firm had no documents, books, or letters, relating to the real issue in this action other than those annexed to the affidavit; that he was prepared to give to the defendants every facility in his power or in the power of the underwriters to ascertain any fact which was in their possession and which they considered important for their defence, and would submit on oath all the documents and correspondence in his possession or in the possession of the said underwriters relating to the matter, if the Court would allow this in lieu of further discovery from the nominal plaintiffs, which he believed it was impossible to obtain.

1881. July 1. *Butt, Q.C.*, and *Stubbs*, for the plaintiffs.
Cohen, Q.C., and *Barnes*, for the defendants.

COLERIDGE, L.C.J. The substance of this application is to be relieved from further obedience to orders which the real plaintiffs have obeyed as far as they can, but which they find themselves incapable of further obeying.

The facts, as I understand the case, are these. A cargo has been lost at sea, and the underwriters have paid the consignors of the cargo as for a total loss. They are then subrogated to the rights of the consignors, and bring an action against the ship-owners alleging that the loss was occasioned by their negligence. They are met by this, "You must shew us all the papers as if you were the original consignors." As a general rule they must do so, but in this particular case the firm of consignors consists of two persons, and the underwriters have got an insufficient affidavit of documents from one of them, and have also got from them some documents and copies of a good many others, and they say "We have got these documents and copies, and we believe they are all that is material; but at all events they are all we can get. We have complied with the order as far as we can. We will not swear positively that these are all the documents, or that they are all the material documents, for we do not know. We can only say that we have done all we can." Then it is said that if the rule that a plaintiff shall make an affidavit discovering all the documents in his possession that are relevant to the action is not complied with, the action cannot proceed. I apprehend that the rule as to discovery of documents is a rule made in furtherance of justice, but in my opinion if it were applied to the present case it would work gross injustice. The answer given to that is that there ought to be regularity of practice, and that though the discovery on oath of documents in the possession of the underwriters might have been sufficient, if they had taken an assignment and sued in their own names, under the Judicature Act, 1873, s. 25, subs. 6, it is not sufficient where the suit is in the names of the shippers. That does not appear to me a satisfactory answer. Then it is suggested that proceedings might be taken by the underwriters in the French courts or at Odessa to obtain discovery of documents, and that if these proceedings turned out fruitless, then a fresh application might be made to this Court to dispense with further obedience to the order. If the law is to be settled on that footing it must be by a higher authority than mine.

POLLOCK, B. I agree in thinking that this application ought to be acceded to. The rule that a plaintiff shall produce all documents in his possession which affect the interests of the defendant is, I apprehend, a rule of substance and not a mere technical rule. If I thought that in the present case documents were withheld through failure of the plaintiffs to use all means in their power to obtain them, or that any course was being taken which amounted to a juggle on the part of the plaintiffs, by putting one person forward so as to prevent the defendants from having the rights which they could claim against another, I should not concur in the course which we now propose to take. This appears to me an honest case on the part of the real plaintiffs, the underwriters, who are subrogated to the rights of the assured. The assured are persons not easily got at. The real plaintiffs have satisfied me not only that they have done their best to get at the nominal plaintiffs, but that they have done their best to afford the defendants all the information they are entitled to, and that being so, I think the action ought not to be stayed because they have not done more. The defendants suffer no injustice, for if the underwriters had taken an assignment and sued in their own names under the Judicature Act, 1873, s. 25, subs. 6, no Court could possibly have made an order against them for production of documents not in the possession of themselves or their agents.

An order was accordingly drawn up "that the plaintiffs be absolved from making any further discovery of documents in this cause."

The defendants appealed.

July 27. *Romer, Q.C.*, and *Barnes*, for the appellants. The affidavit is made only by one of the members of the firm of Raffalovich & Co. instead of both, and is also incomplete. There is no sufficient evidence that both members of the firm could not make an affidavit. The order for the plaintiffs to make an affidavit has not been complied with, and the order now under appeal cannot be sustained.

Stubbs, for the respondents. The Court has a discretion as to ordering production of documents, and will dispense with it where insisting on the ordinary rule would work injustice.

[*Romer, Q.C.*, referred to *Bustros* v. *White* (1) as shewing that there is no discretion.]

---

(1) 1 Q. B. D. 423.

[JESSEL, M.R. Supposing the Court to have a discretion as to making an order, here is an order in force, and all we have to do is to see whether it has been complied with.]

The order does no wrong to the defendants, for it gives the defendants all they could have got if the underwriters, who are the real plaintiffs, had been suing in their own names. *Hartley* v. *Owen* (1) is in favour of there being a discretion.

[JESSEL, M.R. It only decides that there is a discretion under Order XXXI., rule 20.]

The Court can receive the affidavit of the solicitor instead of one by the plaintiffs: *Barnett* v. *Hooper*. (2)

JESSEL, M.R. Whatever I may think of the wisdom of the plaintiffs in consenting to the order which was made on the 28th of July, 1880, it does not appear to me possible to relieve them, in the way in which the divisional Court has proposed to relieve them, from the consequences of that order. The order made on the 28th of July, 1880, was that the plaintiffs should within twenty-one days answer on affidavit as to the documents in their possession or power. That order has not been complied with. Various attempts have been made to comply with some part of it, but it has not been complied with, and it is now asked that the plaintiffs should be required to make a further or better affidavit. That order is not appealable, for it was made nearly a year ago, and moreover was made by consent.

I am not at all prepared to say that some means or other may not be found for enabling the underwriters to recover whatever may really be due to them. They say that they have paid the plaintiffs for a total loss, that the plaintiffs are entitled to sue the defendants for the non-delivery of these goods, and that they, the underwriters, are using the names of the plaintiffs because they have paid them in full, and are surrogated to their rights. The answer to that is this, the names of the members of the firm of Raffalovich & Co. can only be used with their own consent given voluntarily, or under compulsion of the Court. They are the plaintiffs on the record, and they must be taken to have instructed the solicitors and counsel who appear on the present

(1) 34 L. T. 752.

(2) 1 F. & F. 412, 467.

occasion. How can they be heard to say that they will disobey the order of the Court and will not make the affidavit?

As long as these plaintiffs are the plaintiffs on the record, they must be taken to be the parties conducting the litigation, and they must conduct it according to the rules of English jurisprudence and obey the orders of the English Court in which the action is brought. It appears to me the order appealed from must be discharged and the appeal allowed.

Brett, L.J. I am sorry to say that I feel obliged to agree in holding that the contention of the defendants is right in law. If I could find any means according to law to defeat what I believe to be their real object, I should do it without a moment's hesitation.

The underwriters, not having obtained an indorsement of the bill of lading before the loss, are not within the Bill of Lading Acts, and therefore the contract did not pass to them; but they having paid the total loss, the assured were bound and could have been compelled to allow the underwriters to bring the action in the name of the assured. It accordingly has been brought in the name of the assured. The assured are foreigners abroad. The underwriters are, in the sense in which the phrase is always used, the real plaintiffs, that is, they are the persons instructing the solicitors, the persons paying for the action, the persons to benefit by the action, and the persons to lose by the action if it is lost; but in point of law they are not the plaintiffs, the plaintiffs on the record being the only persons who can be recognised as plaintiffs. The plaintiffs are abroad, but they must be taken to have come into an English Court of justice to maintain this action. They are liable, therefore, to all the rules of procedure of the English Court, and amongst other things, if an order for discovery or for production of documents, or an order to make an affidavit as to documents, has been made upon them, they are bound to obey that order just as if they were plaintiffs suing for their own benefit. An order was made upon the two plaintiffs for an affidavit as to documents. It was made by consent, and therefore could not be appealed against; but that seems to me to be immaterial, it is enough that it was not appealed against. The plaintiffs did not obey that order, and in the end the last order but one was that they should make a further affidavit. They did not make it, but an affidavit was made by the solicitor for those whom I call the real plaintiffs, that is the underwriters, in which affidavit he endeavoured to shew that he had done all that he could to get the order of the Court obeyed, and that he could not induce these foreign nominal plaintiffs, although they are the legal plaintiffs on the record, to obey the order, whereupon the divisional Court upon appeal from the Judge at Chambers make this order—that the plaintiffs shall be absolved from further answering. It seems to me that, although that is a somewhat curious phrase, it is equivalent to saying this, that the last order had been in their judgment substantially obeyed, and that therefore, there ought not to be any order for a further answer. Lord Coleridge thinks that this is the right view, because otherwise a great injustice will be done to the underwriters, who have done all that they can to get the order obeyed, and if the order remains as it now stands the nominal plaintiffs will not answer, and the action will be stayed, which will be a great injustice against the real plaintiffs, who have done all they can to obey the orders of the Court.

The question is whether that is a good reason for making the order which the divisional Court has made. I am sorry to say that although it sounds exceedingly just, I do not think it is according to law. It is the misfortune of the real plaintiffs that, being obliged to bring the action in the name of the parties to the contract who are abroad, they cannot get those persons, in whose name they are bound to sue, to obey the procedure of the Court. It is their misfortune, but it may be a misfortune without a legal remedy. The order that the plaintiffs on the record should make the further answer is a proper order, they have not made that answer, and under those circumstances I think that the order made by the divisional Court cannot be supported, although I most heartily wish it could, because I am fully persuaded that the only object of the defendants is to prevent the real matter in dispute between the parties being brought into court and tried.

COTTON, L.J. The only question we have to consider is this, whether according to the law and practice of this Court the order which is appealed from can be sustained. In my opinion it cannot. It seems to have been based by the judges who gave their opinion in the Court below on this, that an injustice would be suffered by those whom they call the actual plaintiffs unless the order which they then made was made. Now I venture to say that the use of the word "injustice" is unfortunate, probably they meant it for hardship. No man can be said to suffer an injustice if when he comes to sue in a court the rules of the court applicable to suitors who seek to enforce their rights are enforced in his case, and the only question which I have to consider, and that I approach without any prejudice either one way or the other, is whether according to the rules applicable to the conduct of litigation the plaintiffs here are right and can sustain the order. In my opinion it cannot be sustained.

The underwriters have come here suing in the name of the plaintiffs on the record. Those are the only plaintiffs. The underwriters getting the benefit of suing in the names of the present plaintiffs must take all the consequences. Now we have not to consider whether it would be discretionary on the part of the Court to make the order for an affidavit of documents, but I in no way favour the view that it is discretionary. I must not be considered as in any way acceding to the view that a litigant has not a right to obtain from his opponent all discovery relevant to the issues between them. But that is a matter of the past. We have here an order made by consent that the plaintiffs should make an affidavit of documents, and the question is really whether that has been complied with, because, as I understand it, this order by Mathew, J., is simply an order adjudicating that the first order for an affidavit had not been complied with, and directing that it should be complied with.

It is said that the plaintiffs have made the affidavit. An affidavit was made by one of the plaintiffs which I will treat as the affidavit of the plaintiffs for the present purpose, but not a sufficient affidavit, that is to say, it did not give that discovery or state those particulars which, according to the law and practice of the Court in England, a person required to give discovery must give. That affidavit, therefore, was not such an affidavit as required by the order, and was not a compliance with the order made by consent.

In my opinion, therefore, when the Court has come to the conclusion that an order has not been complied with, it is the plain duty of the Court to make such order as shall be necessary to enforce compliance with that order. It has done so after deciding that the affidavit was not sufficient by saying, instead of directing any attachment, that those who by the original order had been directed to make the affidavit should comply with that order by making a real and sufficient affidavit instead of the insufficient and therefore unreal affidavit which had been put in.

In one respect the order made in chambers ought, in my opinion, to be varied, and I think the Master of the Rolls and Brett, L.J., will agree with me in that. It directs that both the persons comprising the plaintiffs' firm should make a further and better affidavit. The order ought, I think, to be in the common form, that the plaintiffs do make a further and better affidavit as to documents in their possession.

Stubbs, for the respondents, asked that the words "plaintiff or plaintiffs," should be inserted in the order.

Cotton, L.J. I think that unnecessary. If an attachment is moved for against the plaintiff who does not make an affidavit, and it is shewn that he is not in a condition to make one, no Court will grant an attachment. So if an application is made to dismiss the action because both plaintiffs have not joined in the affidavit, and it is shewn satisfactorily (I do not say that it has been shewn) that one is not in a condition to make an affidavit, no Court would dismiss the action.

Appeal allowed.

Solicitors for appellants: *W. A. Crump & Son.*
Solicitors for respondents: *Stokes, Saunders, & Stokes.*

H. C. J.

1881
May 10.

[IN THE COURT OF APPEAL.]

GILBERTSON, APPELLANT; FERGUSSON, RESPONDENT.

Revenue—Income Tax—Foreign Corporation—Dividends to Shareholders in the United Kingdom—Dividends intrusted to Agents for Payment—16 & 17 *Vict. c.* 34, *s.* 10.

A foreign company carrying on business and earning profits abroad, had an agency in London which conducted a branch and earned profits. The dividends of the company were payable, at the option of the shareholders, abroad or by the London agency. In a particular year the London agency earned an amount of profits which enabled them to pay all the dividends demanded of them in that year without requiring or obtaining any remittance from the company abroad. The London agency were assessed to income tax under Schedule D on the profits earned in the United Kingdom on an average of the three preceding years, the amount on which they were so assessed being less than the amount actually earned by them in that year. They further made a return under 16 & 17 Vict. c. 34, s. 10, that no interest, dividends, or other annual payments payable out of or in respect of the stock, funds, or shares of the company had been intrusted to them for payment in the United Kingdom, and appealed against an assessment of the commissioners whereby they were assessed in respect of the dividends paid by them:—

Held, affirming the judgment of the Exchequer Division, that the London agency were intrusted with the payment of dividends in the United Kingdom, within the meaning of 16 & 17 Vict. c. 34, s. 10, and that they were liable to be assessed on the full amount of the dividends they so paid in the year, but that since the dividends were payable out of the general earnings of the company, consisting of profits made partly in the United Kingdom and partly elsewhere, and the London agency had already been assessed to income tax on the former under Schedule D, they ought not to be further assessed under 16 & 17 Vict. c. 34, s. 10, and pay income tax in respect of that portion of the dividends which represented profits arising out of the United Kingdom.

APPEAL from the judgment of the Exchequer Division, in favour of the respondent on a case stated for the opinion of such Division by the commissioners for the special purposes of the Income Tax Acts. The case is set out at length in the report of it in the Exchequer Division. (1)

The question for the opinion of the Court was as it is there stated to be, whether any portion of the profits made out of the United Kingdom by a Turkish corporation, carrying on business in Constantinople, London, and elsewhere, under the name of the

---

(1) 5 Ex. D. 57.

Imperial Ottoman Bank, and not actually remitted to the United Kingdom was as profits, or as forming part of dividends paid in the United Kingdom, the subject of assessment to income tax under Schedule D of the Act 16 & 17 Vict. c. 34 in the circumstances appearing in the case.

The Imperial Ottoman Bank was a corporation carrying on business as bankers in Constantinople, with branches or agencies at London and Paris. The affairs were regulated by a concession from the Government of Turkey and certain statutes, the terms of which are fully stated in the case, as set out in the report in the Exchequer Division. The capital of the bank was divided into shares, the certificates of which were made out to bearer, and the shares themselves were transferrable by delivery of the certificates, and the dividends payable thereupon were payable, at the option of the holders, at Constantinople, Paris, or London, by means of coupons attached to the certificates.

In November, 1875, two returns for income tax for the year ending the 5th of April, 1875, were made by the appellant on behalf of the London agency of the bank, one being in respect of the English profits of the bank, and the other being in respect of the dividends of the bank. The return in respect of the English profits was: "The London agency act in the character of agents for the Imperial Ottoman Bank, which resides at Constantinople, in the Empire of Turkey. The amount of profits and gains accruing to the bank from the trade of banker exercised within Great Britain, viz., at London, for the year ending the 5th of April, 1875, computed on a just and fair average of three years, ending the 31st of December, 1873, the last-mentioned day being the day on which the accounts of the said bank have been usually made up, is 81,477*l.* 14*s.* 8*d.*" The return in respect of the dividends of the bank was: "There were no interest, dividends, or other annual payments payable out of or in respect of the stocks, funds, or shares of the said Imperial Ottoman Bank, and (within the meaning of the said Act (1)), intrusted to the said London agency for payment to persons, corporations, companies, or societies in the United Kingdom, and payable by the said London agency for the year ending the 5th of April, 1875."

---

(1) 16 & 17 Vict. c. 34, s. 10.

It appeared that in the year 1874–75 the amount of the dividends paid in England in respect of the profits of the Imperial Ottoman Bank was 98,322*l.* 10*s.* In former years sums had been remitted from abroad out of the foreign profits of the bank to make up, with the money in the hands of the London agency derived from the English profits, the sums required for the payment of the dividends which were paid in England by such London agency, but in the year 1874–75 the amount of English profits (145,539*l.* 0*s.* 2*d.*) being in excess of the amount required for the dividends payable in England, no remittance from abroad out of foreign profits was required or made towards payment of the said sum of 98,322*l.* 10*s.*

The commissioners, for special purposes, made an assessment for the year 1874–75 on the said 81,477*l.* 14*s.* 8*d.* for the English profits, and no objection was made to this by the appellant on behalf of the London agency.

The said commissioners considered however that the bank was liable to income tax in respect of so much of the amount paid in the United Kingdom by way of dividend as consisted of profits earned abroad, but having no information as to how much of the money so paid represented English profits, which were included in the assessment on English profits, and how much represented foreign profits, they made in the first instance, an assessment, which was called in the case an assessment on dividends, on the whole of the said 98,322*l.* 10*s.*, leaving the London agency to prove upon appeal what amount should be deducted as having been included in the assessment on the English profits. The commissioners also made, as an alternative assessment, an assessment, called in the case an assessment on general profits, on 115,935*l.*, which they ascertained to be the amount on an average of the three preceding years of the proportion of the foreign profits distributed in dividends in England, and which sum, with the addition of the sum of 81,477*l.* 14*s.* 8*d.*, the amount of the assessment on the English profits, amounted to a total assessment in respect of profits of 197,412 14*s.* 8*d.* The way in which the commissioners arrived at this result was shewn by a statement of account set out in the case.

The appellant, on behalf of the London agency, appealed to the commissioners, who being of opinion that one of the two assessments was right, confirmed both, subject to a case for the opinion of the Exchequer Division. The case was heard by Kelly, C.B., and Pollock and Huddleston, BB., when the assessment on profits was held to be wrong, but the assessment on dividends was held to be correct in principle by Pollock and Huddleston, BB. (Kelly, C.B., dissenting), and the order of the Court was as follows: "The Court are of opinion that the decision of the commissioners for special purposes of the income tax on confirming the assessment on dividends made upon the committee of the Imperial Ottoman Bank" (the London agency) "for the year 1874, ending the 5th of April, 1875, is based upon the right principle of assessing, in so far as it assesses so much of the profits of the bank, intrusted to the committee for payment of dividends in the United Kingdom, as is not shewn by a proper return on the part of the bank to arise from profits made in the United Kingdom, and do order the case to be remitted to the commissioners to be dealt with by them on the above-stated principle, and do further order that no costs be paid on either side."

The appellant, on behalf of the London agency, appealed from this judgment or order of the Exchequer Division.

May 9 and 10. *Henry Matthews, Q.C.*, and *Bosanquet*, for the appellant. The commissioners in truth are setting up a claim to assess profits which are not English.

[BRAMWELL, L.J. The commissioners claim to tax the English profits to whomsoever they are paid, and to tax the profits made at Constantinople, if they are paid to English subjects.]

The principal enactment is 16 & 17 Vict. c. 34, s. 2, sch. D. (1) The Ottoman Bank does not "reside" within the United Kingdom

---

(1) The following are the material clauses in Schedule D, in respect of which income-tax is payable, viz., "For and in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall respectively be carried on within the United Kingdom or elsewhere.

"And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident in the United Kingdom, from any profession, trade, employment, or vocation exercised within the United Kingdom."

1881

GILBERTSON
v.
FERGUSSON.

under the provisions of the Income Tax Acts; for in order to "reside," a foreigner must remain in Great Britain for a period of six months: 5 & 6 Vict. c. 35, s. 39. A person really residing in Great Britain is chargeable with the profits of his trade wherever they have been made; but a non-resident is to be charged only with profits actually made in Great Britain. A foreign corporation is to be charged as an individual: *Attorney General* v. *Alexander* (1), where it was held that the Ottoman Bank is not liable to be assessed as a person residing within the United Kingdom. The bank has always paid income tax upon profits actually made in England. It is said that the London agency were intrusted with the payment of the money which was the amount of dividends paid by it in England in 1874-75, within the meaning of s. 10 of 16 & 17 Vict. c. 34 (2), and liable therefore to be assessed to the income tax on such amount. That section, however, deals only with a fund intrusted to the agent in the United Kingdom for payment, and in that year, 1874-75, no money was so intrusted to the London agency by the Imperial Ottoman Bank, for all the dividends paid in England by the London agency in that year were paid out of the English profits. The London agency are not taxable, under schedule D, in respect of the foreign profits of the bank, and the agency, not being intrusted with money from abroad to pay the dividends which they paid, do not come within s. 10. This is not the case of taxing the shareholders but of taxing the bank: *Sully's Case* (3), and there are no provisions of the Income Tax Acts which in this case make the London agency assessable to more than the amount of the English profits on which they have been assessed. The judgment of the Exchequer Division at all events is wrong in the form in which the order has been drawn up, for the Court held that the assessment on profits was wrong.

---

(1) Law Rep. 10 Ex. 20.

(2) By 16 & 17 Vict. c. 34, s. 10, the provision of 5 & 6 Vict. c. 80, for assessing duties on dividends, &c., payable out of the revenue of any foreign state, is extended to all interest, dividends, or other annual payments payable out of or in respect of the funds or shares of any foreign company, which interest, dividends, or annual payments have been intrusted to any person in the United Kingdom for payment to any person in the United Kingdom, and all persons intrusted with the payment of any such interest, dividends, &c., in the United Kingdom, or acting therein as agents, or in any other character, shall do all such acts, matters, and things, in order to the assessing, and charging, and paying of the said duties on all such interest, dividends, &c., as by 5 & 6 Vict. c. 80, persons intrusted with the payment of dividends are required to do.

(3) 4 H. & N. 769, and in error 5 H. & N. 711; 29 L. J. (Ex.) 464.

6 Jur. N.S. 1018

Dicey (*Sir John Holker, Q.C.*, with him), for the respondent. The principle to be ascertained, is first, who are the persons intended to be charged with the income tax and, secondly, what is the machinery by which such persons are to be got at? The schedule D, of 16 & 17 Vict. c. 34, shews who are to be charged, namely, those who have profits from any business carried on within the United Kingdom, and those to whom profits are payable in the United Kingdom wherever such profits may come from, whether from a business carried on within the United Kingdom or elsewhere. The mode of assessment is provided for by 5 & 6 Vict. c. 35 and 16 & 17 Vict. c. 34. Under the earlier Act, if every one did his duty, the bank would make a return of its profits and the shareholder would return what he had received by way of dividend, and in that case the shareholder might claim to be relieved from the payment of duty in respect of that part of the profits which had been already taxed. By 5 & 6 Vict. c. 80, s. 2, all persons intrusted with the payment of annuities or any dividends or shares of annuities, payable out of the revenue of any foreign state to any persons in Great Britain, or acting therein as agents, or in any other character, are to deliver to the commissioners for special purposes true accounts of the amount of the annuities, dividends, and shares payable by them respectively, and the commissioners are to make an assessment thereon, and the persons intrusted with such payments are to pay the duty on the annuities, dividends, and shares on behalf of the persons entitled to the same out of the moneys in their hands. A person who undertakes to pay such dividends is a person intrusted with the payment within the meaning of that section, and is consequently bound to pay the tax, although he may not have received the money from the foreign state required for such dividend. So he is equally a person intrusted with the payment within the meaning of s. 10 of 16 & 17 Vic. c. 34, under which the claim is made by the Crown in the present case.

The respondent is satisfied with the order made by the Exchequer Division, but if that order is not to stand the respondent will contend that the alternative assessment on profits was right.

Henry Matthews, Q.C., in reply.

Bramwell, L.J. I think this judgment should be affirmed, and although the order may require a verbal alteration, I think the substance of it should be retained. I agree with the judgment of my brothers Pollock and Huddleston, and with the reasons they give. With great submission to the late Lord Chief Baron, and with great respect for his opinion, I think he has misunderstood the effect of the contention of the crown in the first part of his judgment.

It seems to me that the substance of the claim which the Crown is making is this, to assess the dividends received in England. Take the case of the shares being equally held in England and Constantinople, and take it that the profits are equal in England and Constantinope, say 1000*l.* in each place. Now the Crown says "assess the dividends received in England, because the persons who receive the dividends are English or persons residing in England," and so this case is under one of the classes in Schedule D." Then the Crown says, "Assess so much of the Turk's dividends as he receives out of the profits made in England." Then if the proportions and profits are what I have said, equal in England and Turkey, the Turk will receive 500*l.* out of the English profits. Therefore upon the whole the Crown says that of the profits made by this bank, supposing they were made in the proportions I have mentioned, three-fourths ought to be assessed to Income Tax." That is the contention of the Crown, and I have no misgiving on the subject that that is right in substance, and I have heard no argument that it is not. On the contrary, it has been conceded that in the case put of two partners, one living abroad and the other in England, and making equal profits and having equal shares, three-fourths of the profits would be taxed in England. It seems to me that that is not susceptible of doubt. Supposing there was only one partner who lived abroad, the whole of his profit made in England would be assessable in England, and because he has got a partner residing here, and consequently only gets half of that profit, there is no reason why the duty should not still be paid. Then there is another illustration; suppose there was one dividend in the course of the year on English profits, and another dividend in the course of the year upon the Turkish profits, I do not see how it could be contested that the whole of the English profits must be subject to income tax, and that the English shareholder's share of the profits that were made in Turkey must be subject to income tax. It seems to me, therefore, that the substance of the Crown's contention is correct, and cannot be controverted.

Then the question is whether the machinery is enough. I think it is. I think it comes within the meaning of s. 10 of 16 & 17 Vict. c. 34, the expression there, "acting therein as agents or in any other character," is most general and comprehensive. There is another case that might be put. Supposing there was a branch at Liverpool, and supposing the agent for the payment of the dividends was in London, it is quite certain that a return must be made shewing the whole of the dividends paid in England, and shewing also the profits made in Liverpool, and I think that this would be done under the words of s. 10, and so that no dividend receiver in England would be made to pay the tax twice over. In the present case, this London agency are persons who have the duty to pay or who are intrusted to pay dividends on the shares of the Turkish company, to the extent only to which those shares are held in England, and to the extent only of the worth of the profit made out of those shares abroad, so that they are not intrusted to pay to the English shareholders the English profits within the meaning of the Act of Parliament, but to pay to the English shareholders the Turkish profits. I think that in that way the very language of the Act of Parliament may be made to work out justly and properly. I think, therefore, the judgment below is right and should be affirmed.

Brett, L.J. I agree with Mr. Dicey that the questions here are first, who are the persons intended to be charged ultimately with the income tax, and next, what is the machinery by which those persons are to be got at?

I think that the first question is to be determined by Schedule D of 16 & 17 Vict. c. 34. The profits dealt with by that

Schedule are the profits arising from business carried on in England, and the profits arising from business carried on abroad. The income tax is to be levied on all profits in such first part, and on so much of those in the second as would accrue to persons residing in England. That divides the profits into two classes.

But when one comes to the profits which have been dealt with in this case, namely, the profits earned by this Ottoman Bank, and which are to be distributed in dividends by that bank, they are not two profits but one indivisible profit, so far as the bank is concerned, which the bank divides within itself. It is a profit arising partly from business carried on in England and partly from business carried on in Turkey, but within the bank it is one profit and one profit only, and which is to be divided in dividends. But when one comes to apply the income tax to it the statute obliges one to divide that profit into two. Each person resident in England, who is to receive a dividend out of that profit, receives part of such dividend in respect of profit arising from business carried on in England, and part in respect of profit arising from business carried on in Turkey. Now the profit which is dealt with by the income tax in the present case is distributed by an agent in England, who is the appellant. That agent has to make a return, and it seems to me that by virtue of the statute he is bound to make a return of the whole amount of profit earned in England, and also of all the dividends payable in England. By the statute the Government are entitled to receive the income tax upon all the profits made in respect of the business carried on in England, and also beyond that on all dividends paid in England, whether in respect of profits made in England or in Turkey. Now it may be true that there are no specific words in this statute which point out that the Government are not to receive the tax twice over, but it would be so clearly unjust and obviously contrary to the meaning of the statute that the Government should have the tax payable twice over by the same person in respect of the same thing, that I should say it was a necessary implication that that could not be right.

Therefore if part of the dividends in respect of which the income tax is payable is also in respect of profits earned from

1881

GILBERTSON v. FERGUSSON.

Brett, L.J.

a business in England, the tax on that part would have to be paid twice over, which ought not to be; and as to that there should be a deduction. In respect, however, of so much of the dividends payable in England as is derived from profits from business carried on in Turkey, it is not paid twice over, and consequently as to that there ought not to be any deduction at all. That being so, it seems to me that the order of the Divisional Court is in substance correct. That order points out the true principle, which is, that in respect of so much of the dividend as is payable out of the profits from the business carried on in England the income tax is to be paid not twice but only once, but that the income tax is also to be paid in respect of so much of the dividend which is paid in England from the profits of business carried on in Turkey. It may be that the order requires a verbal alteration, because it has used the word "profits" instead of "dividends" at the beginning, but that is so slight that it really makes no substantial alteration. The principle of the judgments of Pollock, B., and Huddleston, B., seems to me to be correct, and it is that principle which has now to be upheld.

Whether it is properly worked out by the rule of three sum stated in the case I know not, and do not care. That is a matter for an accountant more than for a court of law.

The judgment below does not deal with that, but directs that the principle which is to be carried out shall be carried out by some manipulation or other correctly, and that seems to me to be the judgment we ought to give now. The judgment below, therefore, is substantially affirmed.

COTTON, L.J. The English agency has been called upon to pay, and there is no doubt they are liable to pay, income tax on the profits made by the business carried on by that agency in England. The question arises how far, if at all, they are liable to pay duty in respect of dividends from profits made by the bank in Turkey, which are paid in England to the shareholders of the bank, and, as I understand, these dividends are payable by coupons to bearer, and any person in England may receive his dividends and have them payable here. When a corporation carries on its business in more than one place, the dividends are not a share of the profits arising on the transactions in any one place, but of the profits made by the entire business of the corporation, and unless for any purpose it is necessary to analyse the source from which the dividends arise, it must be taken that the dividends are not paid out of any particular fund, but out of the sum which on the whole transactions of the corporation is the profit during the year. Suppose the English branch to make large profits, and the bank in Turkey a large loss, or, on the other hand, the English branch to make a loss, and the bank at Constantinople to make a large profit, it cannot be said because the shareholders are residing in one country or the other that they get their dividends in respect of the profits of any particular country, but in respect of profits of the entire transactions of the company taking it as a whole, and when we look at the statutes of this bank there is nothing at all to take them out of the general rule; there is nothing about profits in England and profits in Constantinople, or anything to shew how far or out of what profits dividends to the shareholders in any particular country are to be paid. Now the Act by Schedule D charges income tax upon the profits which are paid to persons resident in England, and on the profits made in England by persons, which include corporations, whether resident in England or not. It must be conceded that if there are any shareholders who reside in England and receive dividends there they are chargeable under the Act, and are bound to make a return and pay the tax on what they so receive. There is no exception in their case in respect of so much of their dividends as is attributable to or arising in respect of profits made in England, but I take it there would be this implied exception, that when duty is charged as against the person in one part of the Act he is not to be charged again under another part applying no doubt in terms to him, but intended to include those who have not been charged under the preceding part. Of course s. 10 of 16 & 17 Vict. c. 34, is the section, if any, on which the English agency ought to be made chargeable. I quite agree we ought not to put a strained construction upon that section in order to make liable to taxation that which would not otherwise be liable, but I think it is now settled that in construing these revenue Acts, as well as other Acts, we ought to give a fair and reasonable construction, and not to lean in favour of one side or the other, on the ground that it is a tax imposed upon the subject, and therefore ought not to be enforced unless it comes clearly within the words. That is the rule which has been laid down by the House of Lords in regard to the Succession Duty Acts, and I think it is a correct rule.

Now, first, this 10th section is not, in my opinion, a clause imposing on the bank or the English agency on behalf of the bank a liability to pay duty in respect of profits coming to them, but it is a mode of collecting the duty which would be chargeable on the persons who are to receive the dividends. The liability of the agent to pay may be different from his liability to make a return. I think, having regard to s. 2 of 5 & 6 Vict. c. 80, that the liability of the agent to pay only arises when he has received money to pay, and that payment is to be by him out of moneys in his hands; but that is an entirely different question from his liability, and duty, to make a return of dividends which he is intrusted to pay, and we do find in that second section express words that he is to make a return of, inter alia, the dividends, the payments of which are intrusted to him. It may be said that payment of the dividends is not intrusted to him until he gets the money to pay them. That may be so, but then still the question arises when the dividend is intrusted to him, is he or is he not to pay the duty. It is a fallacy, in my opinion, to say that these dividends are payable out of English profits which have already paid duty. The dividends are payable in respect of all profits, and although the shareholders would be entitled to say as against the Crown, part of this is attributable to English profits, and we have already paid duty in respect of that, yet part of it, in my opinion, is attributable to and must be taken as payable in respect of profits accruing from business in Constantinople, and therefore it cannot be said that duty has been already paid in respect of that part of the dividend, because duty has been paid on the English profits, and those profits appear to exceed or equal the amount of dividends which is paid to the shareholders in England. It is said, and it strikes me as a difficulty, that there is no provision here enabling any of the shareholders to get back, or to enable the English agency to make an exception in their return in respect of that proportion of the dividend which is to be attributable to English profits; but that can only be dealt with in this way, that where the dividend has already been taxed then, by the necessary implication of the statute, the duty is not again to be paid upon it, and therefore the exception must be allowed, which is provided for by the order made by the Court below, that a return is to be made and duty is to be paid except so far as the dividend is shewn, by a proper return on the part of the bank, to arise from profits made in the United Kingdom which has already been charged with the duty.

In my opinion, therefore, the judgment of the Court below is right, but I would suggest that the order should be altered by stating that it "is based upon the right principle of assessing, in so far as it assesses so much of *the dividends* intrusted to the committee for payment in the United Kingdom as is not shewn, by a proper return on the part of the bank, to arise from profits made in the United Kingdom." It is put in the order as drawn up at present, "in so far as it assesses so much of the profits of the bank," and, in my opinion, it is not necessary to shew that it is profits. Whatever dividend they are intrusted to pay, of that, in my opinion, a return is to be made, and on that, in my opinion, duty is to be paid, unless so far as it is shewn that that dividend arises from or is payable in respect of profits made in the United Kingdom.

BRAMWELL, L.J. I wish to add that our judgment does not make the profits of the bank pay a larger income tax than they ought to pay, even supposing the objection raised on the part of the appellant to be well founded; because the income tax ought to be upon the English profits, and the shareholders ought also to pay the tax on what they receive from the Turkish profits. The only result, if we had not so decided, would have been, as it seems to me, that the bank, when it paid its English shareholders, would have paid them with a deduction of the income tax on their proportion of the English profits, but without any such deduction on their proportion of the Turkish profits, and then each such shareholder would have had on his return to the income tax commissioners to have charged himself in respect of the dividends received by him on which he had not paid tax.

Judgment affirmed.

Solicitor for appellant: *G. M. Clements.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. P.

[IN THE COURT OF APPEAL.]

June 30.

THE QUEEN *v.* HOLL AND OTHERS.

Parliament—Corrupt Practices Prevention Act (26 & 27 *Vict. c.* 29), *s.* 7—*Certificate to Witness—Mandamus—Jurisdiction to hear Appeal—Supreme Court of Judicature Act*, 1873, *s.* 47—*Criminal Matter.*

Where the Commissioners appointed to inquire into corrupt practices at a parliamentary election have, with reference to a witness before them on such inquiry, exercised their judgment as to the right of such witness to receive their certificate under s. 7 of the Corrupt Practices Prevention Act (26 & 27 Vict. c. 29), their decision refusing such certificate is conclusive, and cannot be reviewed by mandamus.

Reg. v. *Price* (Law Rep. 6 Q. B. 411) dissented from.

The decision of a Divisional Court discharging a rule for a mandamus to such Commissioners to grant such certificate, which certificate if given would be a protection to the witness against criminal proceedings for bribery, does not relate to a criminal cause or matter, within the meaning of the Supreme Court of Judicature Act, 1873, s. 47, and the Court of Appeal is not therefore deprived of jurisdiction to hear an appeal against such decision.

APPEAL from the decision of the Queen's Bench Division, discharging a rule nisi for a mandamus to the Commissioners appointed to inquire into corrupt practices at the late election for the borough of Sandwich, directing them to grant to one James Barber Edwards a certificate pursuant to s. 7 of 26 & 27 Vict. c. 29, the Corrupt Practices Prevention Act. (1)

---

(1) 26 & 27 Vict. c. 29, s. 7: "No person who is called as a witness before any election committee, or any Commissioners appointed in pursuance of the Act of the Session holden in the 15th and 16th years of the reign of her present Majesty, chapter 57, shall be excused from answering any question relating to any corrupt practice at or connected with any election forming the subject of inquiry by such committee or Commissioners, on the ground that the answers thereto may criminate, or tend to criminate, himself; Provided always, that where any witness shall answer every question relating to the matters aforesaid which he shall be required by such committee

It appeared from the affidavits that in September, 1880, William Haworth Holl, Q.C., Richard Edward Turner, and Francis Henry Jeune, barristers-at-law, were appointed under 15 & 16 Vict. c. 57, Commissioners to inquire into the existence of corrupt practices at the election of May, 1880, for the borough of Sandwich, and that Edwards, who had acted at such election as the agent for Sir Julian Goldsmid, one of the candidates, was called as a witness and examined before the Commissioners upon matters relating to the inquiry. In the course of such examination, being asked to explain an item of 14*l.* charged in a bill sent in by him as payable to one John M. Brown for preparing canvassing books, Edwards represented to the Commissioners that it was a proper charge for the work which had been done by Brown, whereas it was afterwards proved that Brown's charge for that work was only 4*l.*, and that the figure 1 had been inserted before the 4 by the witness himself, to make it appear a charge of 14*l.* instead of 4*l.* The witness subsequently explained this by saying that part of the work had been done by his clerks before the matter was placed in the hands of Brown, and that these clerks would be entitled to be paid the difference between the 4*l.*

---

or Commissioners (as the case may be) to answer and the answer to which may criminate, or tend to criminate, him, he shall be entitled to receive from the committee, under the hand of their clerk, or from the Commissioners under their hands (as the case may be), a certificate stating that such witness was, upon his examination, required by the said committee or Commissioners to answer questions or a question relating to the matters aforesaid, the answers or answer to which criminated or tended to criminate him, and had answered all such questions or question; and if any information, indictment, or action be at any time thereafter pending in any court against such witness for any offence under the Corrupt Practices Prevention Acts, or for which he might have been prosecuted or proceeded against under such Acts, committed by him previously to the time of his giving his evidence, and at or in relation to the election, concerning or in relation to which the witness may have been so examined, the Court shall, on production and proof of such certificate, stay the proceedings in such last mentioned information, indictment, or action, and may at its discretion award to such witness such costs as he may have been put to in such information, indictment, or action: Provided that no statement made by any person in answer to any question put by or before such election committee or Commissioners shall, except in cases of indictment for perjury, be admissible in evidence in any proceeding civil or criminal."

and 14*l.* The Commissioners, in an affidavit made by them in answer to the rule nisi for the mandamus, stated that Edwards did not in their judgment answer truly the questions put to him in respect of this item of 14*l.*, and that in their judgment the answers made by him were evasive and untrue, and the questions to which they were given were in their judgment questions the answers to which might criminate or tend to criminate him. There were also answers to questions relating to another part of the expenses at the election which the Commissioners further considered to be untrue, but which it is not necessary to set out here. In the result the Commissioners refused to give him a certificate under s. 7 of 26 & 27 Vict. c. 29.

Edwards thereupon applied to the Queen's Bench Division, and obtained a rule nisi for a mandamus directed to the Commissioners, commanding them to grant him such certificate.

Cause was shewn against that rule in June last, when the Queen's Bench Division, consisting of Lord Coleridge, C.J., and Manisty and Bowen, JJ., being of opinion that the Commissioners had exercised a wise discretion in finding that Edwards had not answered all the questions truly, discharged the rule on the authority of *Reg.* v. *Burrows.* (1)

Edwards appealed.

Meadows White, Q.C. (*Sir J. Holker, Q.C.*, and *Anderson*, with him), for the appellant.

Par. 1579

---

(1) *Reg.* v. *Burrows* came before the Court of Queen's Bench in January, 1870, on an application on the part of one Burrows, who had been examined as a witness before the Commissioners appointed to inquire into corrupt practices at the Beverley election, for a rule for a mandamus to such Commissioners to direct them to grant him a certificate of protection in the terms of 26 & 27 Vict. c. 29, s. 7. The Court of Queen's Bench (consisting of Blackburn, Mellor, and Lush, JJ.), refused the application, as they were of opinion that the witness had evaded or equivocated in his answers to the questions which had been put to him, and had therefore not answered as required by the statute, and that the Commissioners had come to a right conclusion in refusing the certificate. The Court, however, distinguished that case from that of *Reg.* v. *Price* (Law Rep. 6 Q. B. 411), which they considered did not conflict with it, as there the examination before the Commissioners had not been conducted in a satisfactory manner, and the Court therefore thought that it was proper that there should be an inquiry under the mandamus whether the witness had or not honestly answered the questions.

1881

THE QUEEN v. HOLL.

Sir H. James, A.G., for the respondents. There is a preliminary objection to the hearing of this appeal. A rule nisi was granted to compel the Commissioners to give to the witness a certificate, which should indemnify him against criminal proceedings for bribery committed at a parliamentary election; it is therefore "a criminal cause or matter," within the Supreme Court of Judicature Act, 1873, s. 47, and no appeal will lie to this Court. The Court of Appeal has no jurisdiction to hear an appeal as to the costs of an information for libel: *Reg.* v. *Steel.* (1)

[BRAMWELL, L.J. We all are of opinion that the present appeal does not relate to a "criminal cause or matter," and that we must hear it.]

Meadows White, Q.C., and *Anderson*, for the appellant. This is an application to compel the Election Commissioners to grant a certificate of indemnity under 26 & 27 Vict. c. 29, s. 7. The decision of the Commissioners is not final, and may be reviewed by this Court: *Reg.* v. *Price.* (2) It must be admitted that in order to entitle himself to a certificate a witness must answer truly: *Reg.* v. *Hulme* (3); but if a witness who has given false answers, afterwards corrects his evidence and answers truly, he is entitled to a certificate. The case for the appellant is that, although he gave incorrect answers at first, he afterwards afforded full information. Further the questions which he omitted to answer correctly had no criminating tendency.

A. L. Smith (*Sir H. James, A.G.*, with him), for the respondents. The Court is in effect asked to compel the Commissioners to certify that the witness has answered all the questions put to him truly; they may return to the mandamus that he has answered the questions untruly; the jury may find that the witness answered truly; this difference of opinion between the Court and the Commissioners would be unseemly. The Commissioners are invested with judicial powers, and their discretion in exercising them ought not to be overruled. The case of *Reg.* v. *Price* (2) was wrongly decided. This is not a case in which a mandamus ought to be granted: a mandamus is purely a matter of discretion: per Lord Chelmsford, *Reg.* v. *Churchwardens of All*

---

(1) 2 Q. B. D. 37.

(2) Law Rep. 6 Q. B. 411.

(3) Law Rep. 5 Q. B. 377.

Saints, Wigan (1), and as the judges of the Queen's Bench Division have declined to allow a mandamus to issue, this Court ought not to interfere with their decision.

Reg. v. *Burrows* (2) is an authority that, in a case like this where the witness has not answered truly, a mandamus to the Commissioners to give the certificate will not be granted.

[He further contended that the questions which the witness answered untruly were such as might tend to criminate him in relation to corrupt practices within the meaning of the statute, but this part of the argument is omitted as unnecessary for this report.]

Meadows White, Q.C., replied.

BRAMWELL, L.J. I am of opinion that this decision should be affirmed, but I am not satisfied that it ought to be affirmed upon the ground upon which it was given, because I am not satisfied that the questions which Mr. Edwards is particularly supposed to have answered untruly are questions that he was bound to answer truly in order to entitle him to a certificate. It seems to me that the meaning of this Act of Parliament is that no person who is called as a witness shall be excused from answering every question relating to a corrupt practice at or connected with any election, on the ground that the answer may criminate or tend to criminate him; provided that where any witness shall answer every question which he shall be required by such committee or Commissioners to answer, the answer to which may criminate or tend to criminate him, he shall be entitled to receive a certificate. I cannot say under these circumstances, and this being the language of the Act of Parliament, that if a man were to answer every question, the answer to which criminated or tended to criminate him, and then peremptorily refused to answer some other question, a truthful answer to which would not either criminate or tend to criminate him, that he would not be entitled under the Act of Parliament to have his certificate. Now I have a difficulty with reference to these questions which he is supposed to have answered, and no doubt did answer, untruly. I cannot say that they were questions the answers to which, if he had truly given them, would have criminated or tended to criminate him, that is to say, they might have criminated him of obtaining money by false pretences, but I cannot see that they would tend to criminate him of any corrupt practice. It would be said probably that, if that were so, the Commissioners ought to have granted the certificate, but it is perfectly possible they might, from the materials before them, see a consequence which I cannot see, and therefore I protest against its being supposed that I practically hold that they were wrong in refusing the certificate. But in my opinion this judgment should be affirmed on the ground that the judgment of the Commissioners in this matter is conclusive. I think the case of *Reg.* v. *Price* (1) was wrongly decided, and I have so strong an opinion upon it that I must give utterance to it notwithstanding the opinion of the learned judges there. It seems to me that this statute must be read, Provided always that where any witness "in the judgment of the Commissioners or committee," and that those words must be put in. There is no one so reluctant as I am to put words into an Act of Parliament or into an agreement, and I think it would be altogether unreasonable to do so, except for the most cogent consideration, but I think such consideration exists here. It is quite certain that some words must be introduced into the Act. First of all the words "criminate him," by the concession of everybody must mean criminate him "as to corrupt practices"; those are words which must be introduced as everybody admits. Another thing which everybody admits is that the expression, "When any witness shall answer" means answer "honestly"; I will not say "truly," because a man may make a mistaken answer, and I agree with Mr. Meadows White that he would be entitled to a certificate if his answer were an honest one. I think that a cogent consideration compels the introduction of the words, "in the judgment of the Commissioners or committee," because what is the certificate that they return? The certificate is to be a certificate stating that such a witness was required to answer questions relating to the matter aforesaid, the answers to which criminated or tended to criminate him, and had answered all such questions. That means, "and had truly," that is to say, "honestly" answered all such questions. But for them to certify that the man has truly answered all such questions is to certify that, in their opinion and judgment, he has done so. It is not certifying to a mere matter of fact which requires no opinion or judgment upon it, as that the man was sworn, or that he gave his evidence in a black coat, or anything of that sort, but it is the expression of a judgment or opinion that he had bonâ fide answered all those questions, the answers to which criminated or tended to criminate him. It cannot be otherwise. If the certificate of the Commissioners is to be an expression of their judgment and opinion, how can you substitute the judgment and opinion of any other tribunal? Suppose it is referred to a jury, or the Court undertake to decide for themselves. If there was an allegation in the mandamus that the witness had answered bonâ fide, and there was a traverse of it, I suppose the right tribunal to which it would go would be a jury. Supposing then a jury found that the man had answered bonâ fide, are the Commissioners to say, "We certify that the jury who tried this cause are of opinion that the man bonâ fide answered"; would that be the certificate the statute requires? Obviously not, and it cannot have been intended, because a jury, or the Court, if you please, or any other tribunal, is of opinion that the man answered bonâ fide, and the Commissioners remain of opinion that he did not, that they should certify to a falsity. It seems to me, therefore, that those words "in the judgment of the Commissioners," must be read into the Act.

---

(1) 1 App. Cas. 611, at p. 620.

(2) See, ante, note (1), p. 577.

---

(1) Law Rep. 6 Q. B. 411.

Now look at some other practical consequences which would result from a decision the other way. There may be many questions upon every one of which there may be a discussion as to whether the man answered truly or not, and there may be many witnesses called, upon the evidence of one or more of whom the Commissioners may come to the conclusion that he did not answer truly; so that you would have to say to a jury "Now gentlemen, was the answer to No. 1 bonâ fide? as to that of course you have the man's own oath that it was, but you have seven witnesses called to prove that it was not, and that the man must have known it was not. Besides, if you think it was not a bonâ fide answer, was it a question which tended to criminate him?"

Is it conceivable that such questions as those should be handed over from the tribunal that heard the whole case to a jury?

Supposing it is a mistaken answer, then the question would be this: "If you are of opinion that it was a mistaken answer, do you think that it was a fraudulent or dishonestly mistaken answer?" Who can judge upon such a question as that? Whose judgment is of any value compared with that of the Commissioners who heard the man at the time he was examined, and who saw that he hesitated and was "broken down" as it is called. In such a case as that to remove it from them seems to me impossible.

Now there is another thing which shews the improbability. If a mandamus would lie to these Commissioners, would it lie to a Committee of the House of Commons? I really do not know what would be said. It would be said "Yes" or "No." I will deal with "Yes." Is it very likely that the legislature contemplated that there should be a mandamus to the members of a Committee of the House of Commons to give a certificate? It is said that the Committee would be functi officio, but if it be true that the committee had separated, and that their functions were over, it is equally true of the Commissioners.

Is it conceivable that, if the legislature intended this certificate should be enforceable from one body, they did not make some provision by which it should be enforceable from the other body? The supposition would be, that in justice the man is entitled to his certificate, and in justice the High Court, the ordinary tribunal, should issue a mandamus to the proper persons to give him a certificate, but that would be the same with regard to a case which came before a Committee of the House of Commons, and in that case it could not be done. That is to suppose that the legislature either contemplated what practically would be an injustice, or that they had lost sight of it altogether. Is not the more rational conclusion this, that they never thought of anything like a mandamus to lie to either of these bodies?

If this mandamus will lie it will be because Mr. Edwards has a legal right to a certificate which has been denied him by those who ought to have given it to him, and an action will lie. Is it conceivable that such an action could lie against a Committee of the House of Commons or those Commissioners; could Mr. Edwards say to such a Committee, I am entitled to a certificate, furthermore I have an action brought against me for a variety of things, and I want damages of you? Is that conceivable? I cannot suppose for a moment that it is.

There is a further reason for saying that the judgment of the Commissioners that the man is not entitled to his certificate is conclusive. Would that certificate if given be conclusive? Would not all the same reasoning that has been brought to shew that this matter may be examined into, equally apply when the Commissioners had granted their certificate? Might it not be said that they had only power to grant it when the witness had truly answered? If what one might call their negative judgment that the certificate should not be given should be examined into, I cannot see any reason why their affirmative judgment that it should be given should not equally be inquired into, but it is impossible to suppose that that should ever take place.

This certificate is not for the purpose of preventing his answers to a particular question being given in evidence against him, because I think that is provided for anyhow, certificate or no certificate, but it is for the purpose of giving him something like a pardon against any proceedings against him for corrupt practices.

For these reasons it appears to me that the certificate is a certificate of the judgment of the Commissioners, and their refusal to give such certificate, whether their judgment was right or not, cannot be inquired into by ascertaining that a jury was of a different opinion.

I am, therefore, of opinion that no mandamus lies, and consequently that the decision of the Court below ought to be affirmed.

BRETT, L.J. I am of opinion that this appeal ought to be dismissed. The first question is whether one is prepared to overrule the decision in *Reg.* v. *Price.* (1) I do not say that at some time, when it is necessary to do so, I should not be prepared to gravely consider the question whether that decision can be upheld, but I rather desire not to do so upon the present occasion, because I do not think that it is necessary. I take the decision in *Reg.* v. *Price* (1) to be this; that upon the existence, in fact, of certain circumstances, a witness who has been examined is entitled as a matter of law to his certificate, and that the existence, in fact, of the circumstances which are to so entitle him are not to be conclusively decided by the Commissioners, but their decision upon whether those circumstances do exist or not as a matter of fact, can be reviewed, and if wrongly decided may be remedied upon a mandamus. I should have expected, I confess, that the legislature would give to a witness examined before these Commissioners almost an absolute right to a certificate, because the legislature, having first of all enacted that bribery which was not a crime at common law should be a criminal offence, have in order to arrive at the truth invaded one of the most fundamental rules of the criminal law of England, namely, that a person is not bound to answer any question which may tend to criminate himself. It is an emanation from that rule that the prisoner charged shall not be examined in any way, and it is the great, and to my mind the grand, rule. But for the purpose of finding out whether there has been bribery at an election, Parliament has taken away that protection from people who they have enacted shall be punished as criminals. That being so, I should have expected that the right to protection in consequence of this obligation to answer, which obligation does not exist as against anybody else in England, should be almost absolute. Therefore, I should be inclined certainly not to differ from what Blackburn, J., has said, that the legislature meant that if the facts did exist, then the man should be entitled to a certificate, but what I should hesitate about, and what I should desire to reserve for further consideration, when it becomes necessary, is the question whether the decision of the Commissioners, after they have taken the matter into their consideration as to the existence or non-existence of the necessary facts, is not conclusive. If that decision is a matter of judicial decision on their part, I should have thought, as there is no appeal direct from their decision, that probably it would come within the rule that all that another Court could do, in the exercise of the prerogative right of granting the mandamus, would be to grant the mandamus if they had declined to exercise their jurisdiction as to those facts, and had refused to consider them. If the Commissioners had come to a conclusion as to the existence of the facts, and had so declared them to exist, but for other reasons had refused to grant a certificate, then I should think that the Court would have a right to issue a peremptory mandamus to them to grant a certificate. Therefore, agreeing as I do at present, with a great part of the decision in *Reg.* v. *Price* (1), I am not certain that I should agree with the whole of it, but I think it is not necessary to determine this, because assuming that the existence of the facts necessary to entitle the party to a certificate may be inquired into by the Court upon a mandamus, it seems to me that, nevertheless, the Queen's Bench Division were justified in the present case in not granting this mandamus.

---

(1) Law Rep. 6 Q. B. 411.

---

(1) Law Rep. 6 Q. B. 411.

Now, it seems to me that the facts which are to entitle the person to the certificate are not the same as the facts which are to be dealt with in the certificate. The facts which must be in existence in order to entitle the person to the certificate are thus stated in the proviso to s. 7 of 26 & 27 Vict. c. 29, "Where any witness shall answer every question relating to the matters aforesaid" (that is "relating to any corrupt practice at, or connected with, any election forming the subject of the inquiry"), "which he shall be required by such Committee or Commissioners to answer, and the answer to which may criminate or tend to criminate him." The person to entitle himself to a certificate must, therefore, have answered a question, and it has been held that he must have answered that question truly. He must not have evaded it. The question, moreover, must be one which he has been required to answer, which has relation to corrupt practices, and the answer to which, not *will* criminate him, and not *will* tend to criminate him, but which *may* tend to criminate him, upon a charge of corrupt practices under the Corrupt Practices Act. Now, what is the meaning of "may tend to criminate him"? It seems to me that was stated by Blackburn, J., in the case of *Reg.* v. *Hulme* (2), and that it is not an answer which may criminate him, but it is an answer which may be one in a link of answers, which may in the end tend to criminate him. I see no harm at all in holding that the legislature meant that a person should answer truly almost every question that is put to him. I cannot think that we ought to construe this Act of Parliament to the effect that when an election agent, the person who knows all about the election, is asked a question the answer to which may not only tend to criminate him, but may also criminate his employer, or half the constituency, he is to be allowed to answer falsely and nevertheless have his certificate. I do not see any difficulty in holding that, if the answers to the questions put to him might reasonably be one link of a chain, then he must answer the questions or he has not satisfied the conditions. Supposing the election agent is called before the Commissioners who are about to inquire into the corruption of the constituency, and he is asked these questions: (Q.) Did you see the candidate on the evening of the nomination?—Yes, I did. (Q.) Did he give you a sum of money?—Yes. (Q.) What did he give you?—He gave me 100*l.*; and it should be proved to the satisfaction of the Commissioners that instead of 100*l.* he gave him a 1000*l.* I should say that a more probable link in a chain, which would end in shewing that he had spent 900*l.* in corruption, could not be suggested. He would have told a falsehood; because he said he had received only 100*l.* Ought he to receive a certificate because he could shew he did not spend 900*l.* in bribery, but put it into his own pocket and cheated the candidate? He would not want a certificate for that, because it was not a transaction for which he could be indicted under the Act, but supposing him to have been guilty of bribery aliunde with other money, then he would want a certificate, but to my mind he ought not to have it, because he has not fulfilled the condition required by the Act. Now, apply that to the present case. Mr. Edwards was the election agent, and he is examined as to the disbursement at the election. The Commissioners produce to him a bill which is in favour of a person named Brown for 14*l.*, and they ask him practically, "Is that a true voucher," and he answers "Yes, it is." That was, I am sorry to say, a deliberate falsehood in order to screen a thing of which he ought to have been absolutely ashamed, and of which he was, or he would not have told the falsehood. Supposing he had answered that question truly, and had said, "No, it is not a true voucher, it is a

---

(1) Law Rep. 6 Q. B. 411.

(2) Law Rep. 5 Q. B. 377.

1881

THE QUEEN v. HOLL.

Brett, L.J.

voucher for 4*l.* really, but it was produced by me as a voucher for 14*l.*" It seems to me that, as then he would have 10*l.* of the candidate's money in his hands at election time, it would not be an unreasonable link in the chain to shew that the next question might reasonably be, What did you do with that 10*l.*; did you spend it in the election; did you give it to an elector? It is not like the case of, Were you convicted twenty years ago of perjury? but it is a matter with regard to an election shewing money of the candidate in his hands, which not improbably, at all events, might be expended in the election. I think that that is sufficiently near to enable one to say that it was an answer which might be a link in a chain to shew that he was guilty of a corrupt practice, and that he cannot evade the falsity of his answer by saying that in point of truth it would not have led to an indictment for a corrupt practice. That meaning of the words "which may criminate or tend to criminate" seems to me to be strengthened by the different expression which is used when you come to the form of the certificate, because the certificate is to state that the witness was upon his examination required by the Committee or Commissioners to answer questions relating to the matter aforesaid, the answers to which criminated or tended to criminate him. They give a certificate in which they state that he has answered all such questions, which answers not "might criminate him," but which criminated or tended to criminate him. The certificate deals with those answers. Now as to to this, I cannot see, with great deference, the difficulty of the Commissioners, or that they are at all likely to be put into the position of having to make a certificate as to something which they do not believe. It is upon these grounds, and the intentional difference of phraseology and the difference of the questions and answers dealt with in the certificate from those questions and answers which are to give him the right to the certificate, that I think this appeal ought to be dismissed. In my opinion it can be without overruling *Reg.* v. *Price* (1), on the ground that the Court may be satisfied that the witness gave a false answer to a question which was reasonably an answer which might be one in a link of a chain of answers which would criminate him, and for that reason I think that he was not entitled to the certificate as to the answers to questions which did criminate him. Therefore, reserving an absolute opinion as to the case of *Reg.* v. *Price* (1), but at the same time desiring to express extreme doubt whether its decision can be supported, I think that on the other grounds this appeal ought to be dismissed.

---

(1) Law Rep. 6 Q. B. 411.

COTTON, L.J. In this case the Queen's Bench Division discharged a rule for a mandamus, and the question for us is whether they were right in so doing. I am of opinion that they were. Now the question has arisen before us, and therefore we ought to express our opinion upon it, whether the Court can under any circumstances interfere by mandamus with the discretion exercised by the Commissioners, and in my opinion though they may possibly under certain circumstances, yet in circumstances such as these there is no power to do so. Under certain circumstances, I think it might be done, if, for instance, it was admitted by the Commissioners that facts existed which would entitle the witness to a certificate, and they refused it, then they would not have exercised the discretion which in my opinion was given to them by this section, and under those circumstances a mandamus might probably issue consistently with the opinion I have arrived at in the present case. But in this case the Commissioners have come to the conclusion that the witness, Mr. Edwards, had not performed the condition necessary to entitle him to a certificate, and they have therefore declined to grant him one. Can we interfere with the exercise of their discretion? That must depend on the true construction of the Act of Parliament. The Commissioners are to give the witness a certificate if he has performed certain conditions, and this is a certificate that he has *honestly* (that word is not in the Act of Parliament, but that is admitted to be the meaning of it) answered the questions put to him relating to corrupt practices in the borough, and which tended to criminate him. Of necessity in my opinion the Commissioners must be intended by the Act of Parliament to be the judges of that which takes place before them, and to say whether they in their opinion considered that the witness honestly answered the questions which were put to him. That they should certify this when they do not think it is the case, because there is some finding of the jury that he has done so, would in my opinion lead to somewhat an absurd conclusion, because why should they certify that the jury has so found? That the witness had honestly answered before the Commissioners questions relating to corrupt practices and which tended to criminate him might be proved by the finding of the jury, but the Act of Parliament does not make his pardon contingent on that; it is to be certified by the Commissioners that he has so answered. That in my opinion, on a fair construction of the Act of Parliament, must necessarily mean that if in their opinion he has honestly answered the questions relating to the corrupt practices at the election, and which criminate or tend to criminate him, they are to give him a certificate, and they are to certify that such is the fact. It is true, as Lord Justice Brett has called attention to the fact, that the questions to which their certificate is to go, are not necessarily all the questions which he must answer as a condition of being entitled to their certificate, but it must be with reference to some of the questions. Here the questions, the answers to which disentitled him to his certificate, are not only included in the previous part of the section, but are questions which would have to be met by the answers referred to in the certificate, but I do not rely on that. I say if from the nature of the certificate the Commissioners are to be the judges as to whether that certificate can be properly and truly given as regards the facts to which it relates, namely, the witness answering the questions as to which the certificate refers, the Commissioners must on a fair construction of this Act of Parliament also decide whether he has fairly and honestly answered the questions, the answers to which are the conditions of his obtaining that certificate. In my opinion that would dispose of this case.

---

(1) Law Rep. 6 Q. B. 411.

I may say one word upon the case of *Reg.* v. *Price.* (1) No doubt our decision is against the decision of the Court in that case. That case was not argued out, and therefore, to my mind that decision is not so satisfactory as it might otherwise have been, if the case had been fully argued with a view to finally determining the question, whether the Court on a mandamus would interfere with the discretion of the Commissioners. In the

(1) Law Rep. 6 Q. B. 411.

1881

THE QUEEN v. HOLL.

Cotton, L.J.

present case, the Commissioners have exercised a discretion which was entrusted to them, and to them only, and in my opinion this Court has no right to interfere with it by a mandamus. That determines this case, but if necessary I should be also willing to affirm the decision of the Queen's Bench on other grounds, because in my opinion Mr. Edwards has not performed the conditions which are necessary in order to entitle him to a certificate, that is to say, I for my part cannot in any way see that the decision that the Commissioners arrived at was an erroneous one. The Commissioners were inquiring into the charges which were sent in to the agent for the candidate, Sir Julian Goldsmid, as to the expenses in the course of the election, and among others there was a bill for 14*l.* That was a charge for work and labour done. The Commissioners were inquiring into the question whether the sum was a really bonâ fide charge for work and labour done; or whether the amount was increased for some purpose which it was necessary to disguise, and the witness when asked, says that that bill for 14*l.* represented a payment for work and labour done which in fact it did not. He was refusing to answer a question which might tend to criminate him, by shewing that to his knowledge money was obtained for the purpose of corrupt practices, under the guise of obtaining it for the purpose of discharging legitimate expenses incurred in this election. Therefore if it were necessary to rely on that part of the case, I should agree with the view of Lord Justice Brett, but as the question arises before us, I think, notwithstanding the decision of *Reg.* v. *Price* (1), I ought to express my opinion that when the Commissioners have, as they have done here, exercised their judgment in the matter left to them to decide, the Court has no right by mandamus to interfere, and to substitute the decision of a jury for any other tribunal than that of the Commissioners on a matter which the Act of Parliament has, in my judgment, left to them.

Appeal dismissed.

Solicitors for appellant: *Mercer & Mercer.*
Solicitor for respondents: *Solicitor to the Treasury.*

---

(1) Law Rep. 6 Q. B. 411.

W. P.

[IN THE COURT OF APPEAL.]

1881
June 27.

McMAHON *v.* FIELD.

Damages—Remoteness—Contract.

Ante 512
21 Ch.D. 30

The defendant, an innkeeper, contracted with the plaintiff, a horsedealer, to provide him with stabling for a number of horses during a fair at which they were to be sold, but in consequence of the defendant, in breach of such contract, having let his stables to another person, the plaintiff's horses after they had been put into the defendant's stables on their arrival there, from a railway journey, were turned out by that person, assisted by the defendant's servant, without their clothing, and they remained in the defendant's yard exposed to the weather for some time until the plaintiff could find suitable stables for them elsewhere. Owing to this exposure several of them caught cold, which depreciated their value in the market:—

Held, that the damage in respect of such cold was recoverable, as it was the probable consequence of the defendant's breach of contract, and was not therefore too remote.

Hobbs v. *London and South Western Ry. Co.* (Law Rep. 10 Q. B. 111) commented on.

Action for breach of contract.

The defendant who was the proprietor of the Shrewsbury Arms Hotel at Rugeley, in the county of Stafford, agreed in May, 1880, with the plaintiff, a horse dealer, to provide him with stabling accommodation for twelve horses during the horse fair at Rugeley.

The plaintiff arrived at the time appointed with nine horses from Ireland, bringing them from Chester to Rugeley by rail. The horses were put into the defendant's stables, and stripped of their clothing preparatory to their being cleaned; but the defendant having in breach of his contract with the plaintiff let the stables to another person, whose horses were removed to make room for those of the plaintiff, that person, with the assistance of one of the defendant's servants, turned the plaintiff's horses out without their clothing, in spite of the remonstrance of the plaintiff and his servants, and amid a scene of great disturbance. The horses remained standing in the defendant's yard exposed to the weather for some three hours before the plaintiff was able to find suitable stables elsewhere, so that four of them caught cold, which depreciated their value in the market.

1881

McMahon
v.
Field.

The action was tried before Fry, J., at the last Chester winter assizes, when the jury found that there had been a breach of contract by the defendant, and that the cold which the horses caught was the result of that breach, and they assessed 50*l.* as the damage in respect of such cold, and 25*l.*, inclusive of 5*l.* which the defendant had paid into Court, as the plaintiff's damages for not having the stables contracted for. The learned judge, after argument on further consideration, gave judgment for the plaintiff for 20*l.* only, considering that he was obliged to follow *Hobbs* v. *London and South Western Railway Company* (1), and, therefore, to hold that the damage in respect of the cold taken by the horses was too remote to be recovered. The plaintiff by way of appeal applied to set aside this judgment, and to have instead judgment entered for him for 50*l.* and costs in addition to the said 20*l.*

June 16. *McIntyre, Q.C.*, and *Marshall* for the plaintiff. The plaintiff is entitled to this 50*l.*, the jury having found that this cold which the horses caught was the consequence of the defendant's breach of contract. The case of *Hobbs* v. *London and South Western Ry. Co.* (1) is distinguishable, as there the plaintiff's wife taking a cold from a wet walk, under the circumstances of that case, might perhaps be said to have been an event which could not be expected to occur from the neglect of the defendant's company to carry the plaintiff and his wife to the right station on their railway, whereas the cold which the plaintiff's horses took was the natural and probable consequence of turning them out from a warm stable to be exposed, as they were, for some time to the weather without their clothing. If, however, *Hobbs* v. *London and South Western Ry. Co.* (1) cannot be distinguished it ought to be overruled. It was not approved of by Fry, J., though he felt bound to follow it; but he invited this appeal. *Davis* v. *Garrett* (2) shews that the damage is not too remote because it is not directly or immediately caused by the wrongful act of the defendant. To the same effect are *Smeed* v. *Ford* (3), and *Sneesby* v. *Lancashire and Yorkshire Ry. Co.* (4) In *Burrows* v. *March*

---

(1) Law Rep. 10 Q. B. 111.

(2) 6 Bing. 716.

(3) 1 E. & E. 602; 28 L. J. (Q.B.) 178.

(4) 1 Q. B. D. 42.

(3) 5 Jur ns 291

Gas and Coke Co. (1) the defendants were held liable for a damage which resulted from the negligence of a stranger.

[Brett, L.J. The question there was not as to the remoteness of the damage, but whether the defendants were liable at all.]

B. T. Williams, Q.C., and *C. Higgins*, for the defendant. The damage from the cold which the horses took is too remote to be recoverable in this action, and the present case cannot be distinguished from *Hobbs* v. *London and South Western Ry. Co.* (2), which is directly in point, and was correctly decided. In *Hoey* v. *Felton* (3) the loss of an anticipated engagement was held not to be the proximate consequence of the acts of the defendant in wrongfully causing the plaintiff to be imprisoned, and therefore in an action for false imprisonment evidence of such damage was properly rejected. The rule is thus stated by the Court in *Hadley* v. *Baxendale* (4): "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." Here the damage arising from the horses catching cold could not be said to be one which in the contemplation of the parties to the contract might be expected from a breach of it.

Cur. adv. vult.

June 27. Bramwell, L.J. I am not satisfied as to what were the facts in this case. It must be taken I think that the defendant broke his contract in not finding the stabling accommodation for the plaintiff which he had agreed to do. The horses of the plaintiff were at first received and placed in the defendant's stables, but as the defendant had let them to another person, that person turned the plaintiff's horses out, and one of the defendant's servants assisted in their being turned out, and it would seem that the defendant was a party to this proceeding. I do not however know why the clothing was not put out with the horses, but it was not, and the horses stood without their clothing in the defendant's yard whilst the plaintiff went to find stables for them elsewhere; and I think the evidence shews that the cold was caught by the horses remaining in that yard for three hours without their clothing. Now did the defendant cause the horses to be there in that state all that time? because if not, it is difficult to see how he is liable for this damage. The jury must be considered no doubt to have been of opinion that the plaintiff had not acted in the matter unreasonably, and the case is somewhat like that of *Clayards* v. *Dethick* (1), where a cabman attempted to bring his horse out of his mews across the outlet of which a trench had been dug by the commissioners of sewers, and in doing so the horse fell into the trench and was killed, and it was decided that the fact that the cabman incurred some danger in his attempt did not disentitle him to recover. I may observe, however, that I do not think that that case was rightly decided, for it is not because the plaintiff chose to incur a risk that he behaved reasonably in the way he acted. In the present case, if the plaintiff, instead of leaving the horses standing in the defendant's yard when he went to find other stables for them, had had them walked about or otherwise exercised they might not have caught cold, and the result might therefore have been different. Had I been left alone to consider this case, I should not have been prepared to say that the plaintiff was entitled to recover this 50*l.*, but as the other Lords Justices are of a different opinion, I do not wish to dissent from them. In *Hobbs* v. *London and South Western Ry. Co.* (2) it was said that the damage to the wife was a secondary consequence of the breach of contract and too remote; and, by way of illustration, the case was given of a person walking home in the dark who took a false step which resulted in a fall and a broken limb; but I must say I do not see why a passenger who, by the default of the railway company, was obliged to walk home in the dark might not recover in respect of such damage, it being an event which might not unreasonably be expected to occur. However, I do not think that the case of *Hobbs* v. *London and South Western Ry. Co.* (2) governs the present case. Here the damage would not have

---

(1) Law Rep. 7 Ex. 96.

(2) Law Rep. 10 Q. B. 111.

(3) 11 C. B. (N.S.) 142.

(4) 9 Ex. 341, at p. 354.

18 Jan 88

(1) 12 Q. B. 439.

(2) Law Rep. 10 Q. B. 111.

1881

McMahon
v.
Field.

happened if there had not been a breach of contract, and although that breach may not have directly caused the damage, yet it was the only event without which the damage could not have happened. I do not therefore dissent but agree that this appeal should be allowed.

Brett, L.J. The question as to the remoteness of damage has become a difficult one since, according to the case of *Hadley* v. *Baxendale* (1), it is for the Court and not the jury to determine whether the case comes within any of the following rules, namely, first, whether the damage is the necessary consequence of the breach; secondly, whether it is the probable consequence; and thirdly, whether it was in the contemplation of the parties when the contract was made. Those two last are rather questions of fact for a jury, than of law for the Court, to determine. Now, the question in this case is whether the fact of some of these horses taking cold is within any of those three rules. It was not the necessary consequence of the breach of contract, but I have no doubt that it was the probable consequence, and if so, it follows that it was in the contemplation of the parties within the meaning of the third rule. It is necessary to consider the facts of this case. The jury have found that the cold which the horses took was the result of the breach of contract, and we are asked to say that such a finding was unreasonable, and that the question was one which ought never to have been left to them. The plaintiff had to bring a number of horses from Ireland to the Rugeley fair, and he had engaged of the defendant stabling for twelve horses. It was the defendant who had afterwards let to some one else the stables which the plaintiff had taken, and who when the plaintiff's horses arrived turned out the horses of that other person and put the plaintiff's horses in. The result of that was what might have been expected; when the other person returned and found his horses had been removed, he caused the plaintiff's horses, nine in number, to be turned out, and in effecting this he had the assistance of one of the defendant's servants. It was then the fair time, and it was next to impossible to find at once stabling elsewhere for nine horses, so that these horses which had just arrived from a railway journey, and were therefore probably

(1) 9 Ex. 341; 23 L. J. (Ex.) 179. 18 Jur 358

feverish, and had been put long enough into stables to have had their clothes removed, were thus put out and exposed to the weather. That is a thing which nobody would do to horses who understood anything about them, as the probability is that they would catch cold. If such a question could be left to a jury they would find, as this jury did, that it was the probable consequence of such an act as this. Then it is said that the case is governed by that of *Hobbs* v. *London and South Western Ry. Co.* (1) Now, I must confess that if I acquiesce in that case I cannot quite agree with it. What were the facts there? A man with his wife and children took a ticket by the train to Hampton Court, his residence being between two and three miles from Hampton Court. The train did not go to Hampton Court, but took them to Esher Station, where they were turned out at about 12 o'clock on a wet night, and being unable to get any conveyance or accommodation at an inn were obliged to walk about six miles to their home. The wife in consequence of the exposure caught a cold, and it was said that such damage was too remote to be recovered. Why was it too remote? There was no accommodation or conveyance to be obtained at Esher at that time of night, so that it was not only reasonable that they should walk, but they were obliged to do so. Why was it that which happened was not the natural consequence of the breach of contract? Suppose a man let lodgings to a woman, and then turned her out in the middle of the night with only her nightclothes on, would it not be a natural consequence that she would take a cold? Had Esher Station been a large one, and there had been flys which might have been had, or accommodation at an inn, and the passengers had refused such and elected to walk home, I should have thought then that what happened arose from their own fault, but that was not so, yet, nevertheless, the judges who decided *Hobbs* v. *London and South Western Ry. Co.* (1) decided, as a matter of fact, that the cold was so improbable a consequence that it was not to be left to the jury whether it was occasioned by the breach of contract. It is not, however, necessary for me to say more than that I am not contented with it, for there is a difference between such a case and the present one. People do get out of a train and walk home at night without catching cold, and it is not nearly so inevitable a consequence that a person getting out of a train under such circumstances as in *Hobbs* v. *London and South Western Ry. Co.* (1), should catch cold, as that horses turned out, as these were in this case, should suffer. There is, therefore, a difference, though I own I do not see much, between this case and that of *Hobbs* v. *London and South Western Ry. Co.* (1) This appeal ought, I think, to be allowed, and it must be considered that in so deciding we are not deciding contrary to the opinion of Mr. Justice Fry, who thought that the plaintiff ought to be allowed to recover this damage.

---

(1) Law Rep. 10 Q. B. 111.

Cotton, L.J. I am of the same opinion. The question is whether the damage for which this 50*l.* was given by the jury is too remote. It is said that the rule is that the damage to be recoverable should be such as would be fairly in the contemplation of the parties at the time the contract was made as the probable result of a breach of it; but in my opinion the parties never contemplate a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract. Was then the damage, which the plaintiff suffered, and for which this 50*l.* has been assessed, the natural and probable result of the defendant's breach of contract? I think it was, and that it must have been expected that horses would catch cold if so exposed. I had a doubt at one time whether the cause of their catching cold was not the absence of their clothing, but as the horses were turned out without their clothing, with the assistance of the defendant's servant, the defendant would be answerable for it. Then was the conduct of the plaintiff reasonable? That question must be considered with reference to the circumstances of the case, and I think that there was nothing unreasonable in his leaving the horses as he did while seeking stables for them elsewhere. This appeal should therefore be allowed.

Appeal allowed.

Solicitors for plaintiff: *Hamlin & Grammer.*
Solicitors for defendant: *Paterson, Snow, & Bloxam.*

W. P.

---

(1) Law Rep. 10 Q. B. 111.

Distinguished. REED v. DEAN. [1949] 1 K. B. 188

1881
Aug. 5.

[IN THE COURT OF APPEAL.]

ROBERTSON *v.* THE AMAZON TUG AND LIGHTERAGE COMPANY.

Contract—Implied Undertaking as to the Condition of a specific Article—State of Repair and fitness for Use.

The plaintiff, a master mariner, contracted with the defendants for a lump sum to be paid him by the defendants, to take a certain specified steam-tug of the defendants, towing six sailing barges, from Hull to the Brazils, the plaintiff paying the crew and providing provisions for all on board for seventy days. The engines of the steam-tug were damaged and out of repair at the time of the contract, but neither the plaintiff nor defendants were then aware of this. The consequence however of the engines being so defective was that the time occupied in the voyage was increased, and the plaintiff's gain in performing his contract was much less than it would otherwise have been:—

Held, by Brett and Cotton, L.JJ., that as the contract related to a specified vessel, there was no implied undertaking by the defendants that it should be reasonably efficient for the purposes of the voyage, and that therefore the defective state of the engines gave the plaintiff no cause of action, it not appearing that the engines were in a worse state when the plaintiff took possession of the vessel than they were at the time of the contract.

Held, contrà, by Bramwell, L.J., that the defective state of the engines gave the plaintiff a cause of action, as there was an implied undertaking by the defendants that the engines were not so defective.

THE plaintiff was a master mariner, and in July, 1876, the defendants being desirous of having six barges towed from Hull to Para, in the Brazils, the plaintiff signed a document which was as follows, viz.:—

"I, Robert Robertson, hereby agree to take steam-tug, towing six sailing barges, from Hull, and one small steamer from the Downs, the latter-named to assist when required, to Para, Brazils, providing and paying crew of officers, sailors, stokers, and trimmers (forty-one men all told), also provisions for all on board for seventy days, and finding nautical instruments and charts for the navigation of the above said steam-tug, steamer, and six barges. The company paying pilotage from Hull to sea; all surplus stores to be left on board to be taken over by and to be the property of the company. I hereby undertake to do all the above, and hold the company harmless in regard to the return of the above crew from

Para, expenses for which shall be borne by me wholly from the date of the arrival of the vessels in Para, for the sum of 1020*l.* sterling, 100*l.* of which shall be payable to me on signing contract, and a further sum of 600*l.* sterling before leaving Hull, for which I shall give guarantee satisfactory to the company; the balance of 320*l.* sterling to be paid by the company's agents in Para, on their being satisfied that no claims exist against the company in regard to me, Captain Robertson, or my crew.

(Signed) "Robert Robertson."

"London, 12 July, 1876."

The defendants agreed to the terms expressed in this document, and it was proved by parol evidence that the steam-tug, mentioned in the written document which the plaintiff was to take, was specifically mentioned to the plaintiff at the time the contract was made as being the *Villa Bella*, which had just been bought by the defendants, and was designated by them for such service. The defendants, and not the plaintiff, found the engineer for the *Villa Bella*, and they also provided the coals. It appeared that previously to the contract, and before the defendants bought the *Villa Bella*, she had been kept for some time sunk in water, and in consequence of it her boilers and engines were considerably damaged and out of repair, but the defendants were not aware of such defects nor was the plaintiff. The result however was, that as her boilers and engines needed constant cleaning, cooling, and repairs, she performed her voyage very slowly. The plaintiff also complained that the defendants' servant in command of the smaller steamer, which the defendants according to the contract provided, and which was called the *Galopin*, steamed away from the plaintiff when in the Bay of Biscay, and that during the whole of the rest of the voyage to the Brazils the *Galopin* ceased to accompany the plaintiff, and rendered no assistance to him, and that by reason of these several matters the voyage occupied sixty days or thereabouts more than it would have occupied if the defendants had fulfilled their contract, and the expenses of the plaintiff were increased, and he lost much time and was deprived of the profits he would have made out of the payment of the said 1020*l.*

The action was tried before Lord Coleridge, C.J., at the

Middlesex Easter sittings of 1878, when the jury were discharged, and the case adjourned for further consideration. In May last, after argument, the Lord Chief Justice was of opinion that there was an implied warranty by the defendants that the *Villa Bella* should be reasonably efficient for the purposes of the voyage, and that there had been a breach of the contract on the part of the defendants in this respect, and also in the *Galopin* ceasing to accompany the plaintiff, and to render him assistance during the voyage, and his Lordship therefore directed judgment to be entered for the plaintiff, and that the amount of damages should be referred to an arbitrator. The defendants appealed on the ground that judgment should be entered for the defendants.

July 1, 2. *Sir H. Giffard, Q.C.*, and *Kenelm Digby*, for the defendants. The contract, which was a written one, relates to a specific vessel, the *Villa Bella*, as proved by the evidence, and therefore there is no implied warranty of fitness for the voyage she was to perform. There were no express terms of warranty, and in a written contract no terms can be implied, unless the facts to which they relate were clearly within the contemplation of both parties. It has been held that no warranty of seaworthiness can be implied in the contract between the owner of a vessel and the seaman who serves on board: *Couch* v. *Steel*. (1)

[BRAMWELL, L.J. In *Fowler* v. *Lock* (2) it was discussed whether there is an implied warranty on the part of the owner of a chattel bailed for hire, that it is reasonably fit for the purpose for which it is intended to be used.]

In *Thorn* v. *Mayor, &c., of London* (3), the principles as to implying terms in a contract are stated by Brett, L.J. Here the relationship between the plaintiff and the defendants was that of a ship's master and a shipowner, although no doubt some of the stipulations were not the usual ones in the case of a master and a shipowner, and the contract between these parties is not one in which the law implies such a warranty as the plaintiff asks to have implied here. Then it must be left to the parties to

---

(1) 3 E. & B. 402; 23 L. J. (Q.B.) 121. 18 Jur 515

(2) Law Rep. 7 C. P. 272; ibid. 9 C. P. 751, n.; ibid. 10 C. P. 90.

(3) Law Rep. 10 Ex. 112, at p. 123.

1881

ROBERTSON
v.
AMAZON
TUG AND
LIGHTERAGE
COMPANY.

expressly stipulate for it in their contract, and there is no such stipulation in the contract in this case. (1)

Butt, Q.C., and *Edward Pollock*, for the plaintiff. The Court should infer from the terms of the contract in this case that the defendants undertook to hand over to the plaintiff a steam-tug which was reasonably fit for the voyage. It is manifest that the written document does not express all the terms of the contract; for instance, there must be an engineer with the tug. The plaintiff found the officers and crew required for the expedition, but he did not provide the engineer of the steam-tug; he was provided by the defendants. If there was an implied contract for the defendants to supply an engineer, why not equally import into the contract that the defendants were to supply the boilers, and fit and proper ones? The defendants could not have tendered to the plaintiff six barges which had holes in them, and were unseaworthy. That must be because of an implied warranty that the barges to be supplied should be reasonably fit for the service. If that be so as to the barges, why should it be different as to the tug? It is said it should, because the tug was named at the time of the contract and the barges were not, but the tug was not seen by the plaintiff.

[BRETT, L.J. Do you say that this was different from the ordinary contract between the master and the owner of a vessel?]

Yes. It is no part of an ordinary contract that the master should supply the crew with provisions. The case of *Couch* v. *Steel* (2), which has been cited on behalf of the defendants, to shew that there is no obligation on the part of the owner of a vessel towards the seamen serving on board that the vessel shall be fit for the voyage, does not apply to a contract like the present, which is not an ordinary contract between the shipowners and the mariner. The plaintiff was under no contract of service; nor was he under the orders of the defendants. In *Fowler* v. *Lock* (1) the Court were not agreed whether the relation of master and servant existed between a cabowner who lets out his cab and the cabdriver to whom it is let. Willes, J., there was of opinion that the cabdriver was the servant of or co-adventurer with the cabowner, but the plaintiff in the present case did not stand in any such relation to the defendants. Surely something must be implied in the contract in the present case. The defendants must be deemed to have undertaken that the tug should at least exist as such, and capable of acting as such when she was taken possession of by the plaintiff for the purpose of fulfilling his contract: *Taylor* v. *Caldwell* (2) and *Appleby* v. *Meyers*. (3) Suppose there was no rudder to the vessel; who was to supply it? or suppose the *Villa Bella* had been accidentally destroyed by a fire, what would have been the effect of that on this contract?

---

(1) With regard to the breach of contract in respect of the *Galopin*, the question entirely depended on one of fact, namely, whether she left the expedition under such circumstances owing to the state of the weather as justified her doing so, and therefore the argument on this point is omitted. The Court of Appeal stated that they were of opinion from the evidence that she left without any justifiable reason, and that therefore there was in this respect a breach of contract for which the plaintiff was at least entitled to nominal damages; but as to whether he was entitled to more would depend on his shewing that he had sustained some actual loss by reason of the *Galopin* not rendering him assistance when required, and the question as to that was left for further inquiry.

(2) 3 E. & B. 402; 23 L. J. (Q.B.) 121. 18 Jur 575

Sir H. Giffard, Q.C., in reply, referred to *Hyman* v. *Nye*. (4)

Cur. adv. vult.

Aug. 5. BRAMWELL, L.J. I am of opinion that the judgment should be affirmed. We disposed on the hearing of that part of the case which relates to the *Galopin*. Holding that in respect of it the plaintiff had a cause of action, if he could prove any damages resulting from the breach of contract in relation to that tug caused by its desertion from the enterprise. It remains to consider the question as to the larger tug.

Now the plaintiff's complaint was not that the vessel was unfit for the voyage and work; that it was not properly built or strong enough. Nor did he complain that the machinery or boiler was inadequate, not of the best make, or a good make, or strong or large enough. Had such been his complaint, then I think it ought to have failed, because his engagement was with respect to specific things, and he took them for better or worse. It is admitted that this was so, and rightly admitted. For in the same way as it

(1) Law Rep. 7 C. P. 272.

(2) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

(3) Law Rep. 2 C. P. 651.

(4) 6 Q. B. D. 685.

might be shewn that, on the sale of a horse or carriage, a particular horse or carriage was meant, so might it be shewn in this case that a specific and definite vessel and specific and definite barges were meant. The plaintiff's complaint was that he had agreed upon a lump sum to take this vessel towing several lighters to the Brazils, that it was important to him that the vessel and apparatus should be efficient, as the faster he went the more he gained, and the slower he went the less he gained or the more he lost. He proved as a fact that the boilers were out of order, that they were sufficient in themselves, but needed repairs, and that in consequence it took him much longer to perform his undertaking than it otherwise would have done. The defects, the want of repair, were obvious—obvious to any one who had looked at or tried the boilers.

The question is, if this gives a cause of action. I am of opinion that it does. The contract of the defendants was to deliver to the plaintiff the tug and barges, with and in relation to which he was to perform a certain work, or bring about a certain result, for the profitable doing of which the efficiency of the tug was all important. The case seems to me the same as a contract of hiring, and as all contracts when one man furnishes a specific thing to another which that other is to use. The man so letting and furnishing the thing does not, except in some cases, undertake for its goodness or fitness, but he does undertake for the condition being such that it can do what its means enable it to do. Thus, if a man hired a specific horse and said he intended to hunt with it next day, there would be no undertaking by the letter that it could leap or go fast; but there would be that it should have its shoes on, and that it should not have been excessively worked or unfed the day before. If I am asked where I find this rule in our law, I frankly own I cannot discover it plainly laid down anywhere. But it seems to me to exist as a matter of good sense and reason, and it is I think in accordance with the analogous authorities. I am afraid that the nearest is the dictum of Lord Abinger in *Smith* v. *Marrable* (1): "No authorities were wanted;" "the case is one which common sense alone enables us to decide." The subject is treated in Story on Bailments, s. 383.

---

(1) 11 M. & W. 5, at p. 9; 12 L. J. (Ex.) 223.

Bramwell, L.J.

And certainly according to what is said there if this had been a case of letting to hire the defendants would be liable. But as Story says, speaking of the letter's obligations (s. 392): "It is difficult to say (reasonable as they are in a general sense) what is the exact extent to which they are recognised in the common law. In some respects the common law certainly differs." This is so. What Story mentions, however, does not affect the principle I contend for. I have referred to some of Story's authorities; I may also refer to Merlin, Répertoire, Bail. s. 6. *Smith* v. *Marrable* (1) and *Wilson* v. *Finch Hatton* (2) are favourable to the plaintiff's contention. In the former case is Lord Abinger's reference to "common sense." But as to these two cases I am afraid "common sense" has differed much in different people, and it is certainly remarkable that in the latter case the Lord Chief Baron refers to the plaintiff as "a lady who generally resides in the country coming to town for the season, sending her carriage, horses, and servants," &c., and proceeds, "therefore it is abundantly clear that it was in contemplation of *both* parties that the house should be ready for her occupation." Even if both parties "contemplated" that, I do not know it follows that they "agreed." The cases of *Readhead* v. *Midland Ry. Co.* (3) and *Hyman* v. *Nye* (4) do not help. They and similar cases shew that where there is an undertaking to supply an article not specific, the article must be "as fit for the purpose for which it is hired as care and skill can make it." The article here was specific, but I think the same reasoning which leads to that conclusion shews that when the article is specific it must be supplied in a state as fit for the purpose for which it is supplied as care and skill can make it. It was asked in the course of the argument, whether the defendants would have complied with their agreement had there been no rudder to the ship? If, as was suggested, a ship is not a ship without a rudder, or if some of its copper was off if it was a coppered ship, or if there was a large hole in the deck or no covering to the hatchways; I think it impossible to say that there was not a duty on the defendants to have the tug free from such defects, and consequently impossible to say that there would not be in such a case a breach of their implied agreement. So I think there is now, and that the judgment must be affirmed.

---

(1) 11 M. & W. 5, at p. 9; 12 L. J. (Ex.) 223.

(2) 2 Ex. D. 336.

(3) Law Rep. 2 Q. B. 412.

(4) 6 Q. B. D. 685.

BRETT, L.J. I am sorry to say that in this case I cannot agree with the judgment of Lord Justice Bramwell. The case was tried before Lord Coleridge without a jury, and Lord Coleridge was of opinion that under the circumstances there was an implied warranty that the larger tug was reasonably fit for the purposes for which it was to be used. The contract between the plaintiff and defendants was in writing, and the only parol evidence which was admissible to my mind for the purpose of construing the contract was evidence to shew what was the subject-matter of the contract. That evidence shewed that the defendants were the owners of the large tug the *Villa Bella* and of the smaller vessel the *Galopin*, and that they were desirous that these tugs should proceed to the Brazils with certain barges.

The larger vessel, the *Villa Bella*, was named to the plaintiff at the time of the contract, and, although I do not think it is material, the plaintiff had an opportunity of seeing it. That at once makes the contract a contract with regard to that specific vessel.

Now the plaintiff, being a skilled mariner and master, undertook by this contract to take the command of the expedition to the Brazils, and to conduct the large tug, the *Villa Bella*, and the barges across the sea. He was to be supplied of course with the means of working the large tug and also the smaller vessel, but he undertook amongst other things to provision the crews, and further, he undertook to conduct this expedition for a fixed sum. It, therefore, was most material to him to calculate what would be the time in which he should in all probability perform the voyage. The larger tug, the *Villa Bella*, at the time when the contract was made, had been kept during the winter in a state which is not infrequent, that is to say, sunk in the water, which may not be so bad for the vessel itself, but it certainly is very deleterious to the engines. She was, in fact, a vessel with engines considerably damaged, but she was the vessel which the plaintiff undertook to conduct across the Atlantic.

I agree with my Lord that there is an analogy, and a somewhat close one, between this case and the case of a person hiring some chattel for the purpose of using it. I think it would be true to say, as in the case he puts of the horse, that where a person hires a specific thing for the purpose of using it, there is an implied contract on the part of the letter that he will in the meantime keep the thing, as I should say, in repair, that is, he will not by want of reasonable care after the contract is made allow it to become worse than it was at the time the contract was made. But with great deference to him, I think that the facts of this case do not raise the point upon which his judgment rests. The *Villa Bella* was a vessel with damaged engines at the time the contract was made, it was that vessel with those engines, such as they were, that the plaintiff undertook to conduct across the Atlantic. Now I think there would be an implied contract on the part of the defendants that they would not by want of reasonable care allow that vessel with its damaged engines to get more out of repair at the time the voyage was to commence than it was at the time that the contract was made. I think they were bound by an implied contract to take all reasonable care to keep the vessel as good and as efficient for the work it was to do as it was at the time the contract was made. But it would be to say that they were bound to make it better than it was at the time of the contract, if it is to be said that they were bound to hand it over to the plaintiff in a state reasonably fit for the purpose of the work it was to do. Now, as I understand my Lord he would not imply such a contract as that, but if he would, I must say that with all deference I cannot agree to it. When there is a specific thing, there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is the great distinction between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made. Therefore, it seems to me that the judgment of my Lord really does, I believe, come to what was the opinion of Lord Coleridge, although in words he negatives it. It seems to me that he holds that the defendants were bound to supply this large tug in a condition reasonably fit for the purpose for which the contract was made, and the breach upon which he relies really is that it was not so fit, whereas it seems to me that there was no such implied contract. I wish to put my view as plainly as I can. If there had been evidence in this case that, after the contract was made, the machinery from want of reasonable care by the defendants had become in a worse condition than it was at the time of the contract, I should have thought that there would have been a breach of contract for which the defendants would have been liable. But I find no such evidence. The only misfortune about the tug was that the machinery at the time the contract was made was in such a condition that the vessel was not reasonably fit for the purpose of taking these barges across the Atlantic. Therefore, the misfortune which happened was the result of a risk which was run by the plaintiff, and of which he cannot complain, and consequently he has no cause of action as regards the *Villa Bella*. The plaintiff is thus reduced, in order to maintain his action, to shew that he suffered damage by the desertion of the *Galopin*. He is entitled to nominal damages in respect of such desertion, and if he can prove that he suffered any substantial damage by reason of it, then the nominal damages will be increased accordingly.

COTTON, L.J. This is an action for breaches of a contract, and the breaches related to two matters. One of them related to the smaller vessel, the *Galopin*, and that we disposed of at the time the case was argued, and we did so on the ground that on the fair construction of the written contract there was a contract on the part of the defendants that the smaller steamer, which was not named, the *Galopin*, should assist when required by the plaintiffs, and that she deserted the expedition, and that there was a breach as to that part of the contract. Our judgment was reserved as to that part of the plaintiff's claim which sought to recover damages for loss sustained by the inefficiency of the *Villa Bella*. This inefficiency was attributed to the fact that the boilers of the *Villa Bella* were not sufficiently powerful for the engines, and principally to the fact that the boilers were in a bad condition,

1881

ROBERTSON
v.
AMAZON
TUG AND
LIGHTERAGE
COMPANY.

Cotton, L.J.

in consequence of what had happened to the tug before she became the property of the defendants. The defendants were not aware of these defects, and the plaintiff cannot recover on the grounds of false representations. He must recover, if at all, on the ground of breach of warranty. The contract does not contain in express terms any warranty, and there is some uncertainty as to the form of the warranty on which the plaintiff relies. It must be either, as urged in argument, and held by Lord Coleridge, that the *Villa Bella* was a vessel reasonably fit for the service to be performed, or, as I understand Lord Justice Bramwell to hold, that the *Villa Bella* and her engines were in a reasonable state of repair. and otherwise in a condition fit for the service so far as that vessel and her engines could be so. The plaintiff tendered evidence to shew that there was such a contract between the parties. But parol evidence is not admissible to construe the contract, and even if in such an action it would be open to the plaintiff to reform the contract the evidence would not establish what is essential for such a case, viz., that both parties agreed to a contract not expressed in the written document. But evidence is admissible to shew what the facts were with reference to which the parties contracted, and thus to enable the Court to apply the contract. The evidence shewed that at the time of the contract the defendants were proposing to send out the *Villa Bella,* and that this was known to the plaintiff. The contract must therefore be dealt with as one made with reference to an ascertained steam vessel. Though the contract contains no warranty in terms, the question remains whether there are in it expressions from which, as a matter of construction, any such warranty as that relied on by the plaintiff can be inferred. In my opinion this is not the case.

The question remains does the contract put the plaintiff and defendants into any relation from the existence of which the law, in the absence of any actual contract, implies such a warranty as is relied on by the plaintiff. In my opinion it does not. The plaintiff was to be master of the *Villa Bella,* but the law does not, as against the owner, imply in favour of a captain or master any warranty of the seaworthiness or efficiency of the vessel: *Couch* v. *Steel.* (1) Here, however, the plaintiff is more than master. It has been suggested that the plaintiff is in the same position as the hirer of an ascertained chattel, and the defendants in the same position as the person who lets the chattel to hire. There is at least a doubt what warranty the law implies from the relation of hirer and letter to hire of an ascertained chattel. But, however this may be, in my opinion the relation of the parties here is different. The plaintiff here contracts with the defendants for a sum to be paid by them to take a vessel and barges to South America, with liberty to use the vessel as a tug. I say with liberty, for it can hardly be said that it would have been a breach of contract on his part not to use the motive power of the tug, but to tow both the *Villa Bella* and the barges to their destination. If the vessel were not at the time of the contract ascertained and known to both parties, probably the contract would imply such a warranty as relied on by the plaintiff. But a contract made with reference to a known vessel in my opinion stands in a very different position. In such a case, in the absence of actual stipulation, the contractor must, in my opinion, be considered as having agreed to take the risk of the greater or a less efficiency of the chattel about which he contracts. He has to determine what price he will ask for the service or work which he contracts to render or to do. He may examine the chattel and satisfy himself of its condition and efficiency. If he does not and suffers from his neglect to take this precaution, he cannot, in my opinion, make the owner liable. He must, in my opinion, be taken to have fixed the price so as to cover the risk arising from the condition of the instrument which he might have examined if had thought fit so to do.

---

(1) 3 E. & B. 402; 23 L. J. (Q.B.) 121. 18 Jur 575

It may well be that, where parties enter into such a contract as that which exists in the present case, there is an implied contract that the owner of the chattel will not after the agreement, and while the chattel remains in his possession, use or treat it in any way which will render it unfit for the service which has to be performed, and that he will take such care of it as is reasonable, having regard to the purpose for which it is under the contract to be used. But in the present case the inefficiency of the *Villa Bella* arose, not from any improper use of the vessel by the defendants, or any neglect on their part to take due care of it after this contract, but from defects which, though unknown to the plaintiff and defendants, existed at the date of the contract. The cases of *Smith* v. *Marrable* (1) and *Wilson* v. *Finch Hatton* (2), or at least the judgments in those cases, have been relied on in support of the plaintiff's case. Each of those cases arose on a contract of hiring, and in each the hirer was defending himself against a claim for damages in respect of a refusal on his part to perform his contract of hiring, while in this case the plaintiff who is (in my opinion erroneously) said to be in the position of hirer, is suing for damages. In those cases if there was an implied condition that the thing, a furnished house, was fit for the purpose for which it was let, by reading into the contract to take the house "if fit for habitation," the defendant was excused. Here the plaintiff must establish that there was a warranty to that effect.

In my opinion the plaintiff cannot establish that there was such a warranty as that on which he must rely, and the defendants are, as regards this part of the claim, entitled to have the judgment reversed.

Judgment reversed.

Solicitors for plaintiff: *Lumley & Lumley.*
Solicitors for defendants: *Ashurst, Morris, Crisp, & Co.*

---

(1) 11 M. & W. 5; 12 L. J. (Ex.) 223.

(2) 2 Ex. D. 336.

W. P.

[IN THE COURT OF APPEAL.]

1881
Aug. 5.

FLETCHER *v.* HUDSON.

Local Government Acts—Public Health Act, 1875—*Local Board, Member of—Contract with the Board—Liability to Penalty for acting as Member when disabled.*

11 QBD 574

By rule 64 of schedule 2 to Public Health Act, 1875 (38 & 39 Vict. c. 55), it is declared that any member of a local board who "in any manner is concerned in any bargain or contract entered into by such board" shall "cease to be such member, and his office as such shall thereupon become vacant;" and rule 70 imposes a penalty of 50*l.* on "any person who, not being duly qualified to act as member of the local board," "or being disabled from acting by any provisions of this Act, acts as such member":—

Held, by Brett and Cotton, L.JJ. (Bramwell, L.J., dissenting), that a member of such board, who having been concerned in a contract by the board has thereupon ceased to be such member by force of rule 64, is a person disabled from acting as a member by a provision of the Act within the meaning of rule 70, and consequently that if afterwards he does so act he is liable to the penalty of 50*l.*

ACTION against the defendant for a penalty of 50*l.* under the Public Health Act, 1875 (38 & 39 Vict. c. 55) for acting as a member of the Grasmere Local Board when he was disabled from so acting by the provisions of the said statute. The defendant, who was an hotel keeper at Grasmere in the county of Westmoreland, was elected a member of the Grasmere Local Board on its formation in May, 1872, and continued to be such member up to the time of the action, unless he had ceased to be such by force of the said statute, in consequence of his being concerned in a contract entered into by such board. The defendant admitted, in answer to interrogatories, that on the 6th of March, 1879, he was paid 9*l.* 19*s.* 9*d.* by the board to reimburse him for work done by him in 1877 and 1878 for the surveyor of the board, but he stated that there was no contract express or implied with the board for doing the work, and that he did it at the request of the surveyor, because the surveyor was unable to get the work done by any one else in time, and delay would have occasioned great expense, and he also stated that he made no profit out of the transaction. The items in respect of which the defendant was so paid consisted of charges entered by the defendant in his book under the head of Highway Act, for the use of men and horses on various days during the year 1877 and 1878, the last of such items being a charge of 7*s.* 6*d.* for two men and horses on the 16th of March, 1878. On the 6th of March, 1879, and on several subsequent occasions he acted as a member of the board.

By rule 64 of schedule 2 to the Public Health Act, 1875, it is declared that any member of a local board who in any manner is concerned in any bargain or contract entered into by such board, or participates in the profit thereof, shall cease to be such member, and his office as such shall thereupon become vacant, and rule 70 of such schedule states that "Any person who, not being duly qualified to act as member of the local board, or not having made and subscribed the declaration required of him by this Act, *or being disabled from acting by any provision of this Act*, acts as such member, shall be liable to a penalty of 50*l.*, which may be recovered by any person with full costs of suit by action of debt; in such action it shall be sufficient for the plaintiff to prove in the first instance that the defendant at the time when the offence is alleged to have been committed acted as such member, and the burden of proving qualification and the making and subscription of the declaration, or of negativing disqualification by reason of non-residence, or not being seised or possessed of the requisite real or personal estate, or both, shall be on the defendant. But all acts and proceedings of any person disqualified, disabled, or not duly qualified, or who has not made and subscribed the declaration required by this Act, shall, if done previously to the recovery of the penalty mentioned in this Act, be valid and effectual to all intents and purposes."

The action was tried before Stephen, J., without a jury, at the last winter assizes for the county of Westmoreland, when that learned judge directed judgment to be entered for the plaintiff for the amount claimed.

The defendant appealed.

June 28. *C. Crompton*, for the defendant. [In the first place he contended that there was no contract with the board to do the work for which the defendant was paid, and that in this respect the learned judge came to a wrong conclusion from the evidence, but the Court stated that they were of opinion that there was ample evidence of a contract with the board in March, 1878, for the work which was then done, and of the defendant being concerned in such contract.]

Assuming that to be so, still the case does not come within the 70th rule of the statute under which the penalty is imposed, and for which this action is brought. The consequence of being concerned in a contract entered into by the board is that, by rule 64, the member ceases to be a member and the office is vacant. He is not disabled by the statute from acting as a member, he is only disabled from acting because he has ceased to be a member, and if he sits and acts afterwards at the board it is the same as if a stranger who had never been elected were to do so. "Disabled from acting" means during the continuance of the contract, but not after the contract has been performed: *Lewis* v. *Carr*. (1)

[COTTON, L.J. Is he not disabled from acting until he has been re-elected?]

A man is not disabled if he can be re-elected. Directly the contract has been performed the defendant was in the position of any other person, and if he had ceased to be a member, and had not been re-elected, his acting as a member was no more than a stranger doing so.

[COTTON, L.J. The defendant acted under the colour of a title.

BRETT, L.J. A man elected who takes his seat at the board without having subscribed the declaration is liable to the penalty under the Act, but a man who so sits who has neither been elected nor has subscribed the declaration is, according to your argument, not liable to the penalty.]

A man who has never been elected is not disabled from acting by reason of the statute, nor was the defendant, who was only disabled because he was no longer a member. The case of *Lewis* v. *Carr* (1) is directly in point, and *Nicholson* v. *Fields* (2), on which the plaintiff will rely, must be considered to have been overruled by *Lewis* v. *Carr* (1); besides, there the contract had not been completed as it had here at the time the defendant acted as

(1) 1 Ex. D. 484.

(2) 7 H. & N. 810; 21 L. J. (Ex.) 233.

member. The enactment is a penal one, and should be construed with strict correctness.

Charles, Q.C. (*Addison, Q.C.*, and *Cock*, with him), for the plaintiff. The point in this case turns on the question whether rule 70, which imposes the penalty, is not directed against the cases of disqualification mentioned in rule 64. That rule 64 is headed disqualification of member, and it mentions what is to be a disqualification. Rule 70 applies then the penalty to any one who acts when he is so disqualified, and uses accordingly the word "person." The case of *Nicholson* v. *Fields* (1) is undistinguishable. There by s. 9 of the Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), it is enacted that any person who, after his "appointment as commissioner," shall be "concerned or participate in any manner in any contract shall thenceforth cease to be a commissioner," and the Court, considering that ceasing to be a member and being disqualified were the same thing, held that the defendant, who was a commissioner, by being concerned in a contract became liable to the penalty imposed by s. 15, which imposed a penalty on any person who should act as a commissioner "after having become disqualified." In that case the same argument was urged for the defendant as is urged here, but without effect, and that case, though referred to in *Lewis* v. *Carr* (2), was not stated to be there overruled. Nor did the Court of Appeal intend to overrule it. The case of *Lewis* v. *Carr* (2) was decided on the Municipal Corporations Act (5 & 6 Wm. 4, c. 76), ss. 28, 53, the language of which is very different from that in these rules of the Public Health Act, 1875.

C. Crompton replied.

Cur. adv. vult.

Aug. 5. BRAMWELL, L.J. I am of opinion that this judgment must be reversed.

I agree with the learned judge who tried the case, that the proper conclusion as a matter of fact from the evidence is that the defendant was concerned in "a bargain or contract entered into by the board;" perhaps in several, though trifling ones. The consequence therefore declared in rule 64 of Schedule 2 of 38 & 39

---

(1) 7 H. & N. 810; 21 L. J. (Ex.) 233.

(2) 1 Ex. D. 484.

Vict. c. 55, followed, viz., "he ceased to be a member of it, and his office as such thereupon became vacant." It may be, also, that while such contract existed he was ineligible; for it is difficult to suppose that he could be re-elected, or that a person could be elected who had a contract with the board. I am not clear upon this, however, as it may be that all that the statute meant was that the propriety of his conduct should be referred to his constituents, as in the case of a member of the House of Commons accepting office under the Crown. Be this as it may, he was not re-elected. He "ceased to be a member." Then is he within the penal clause, rule 70? That says "any *person*," not "member" indeed, but meaning "member," as is shewn by the next provision, "any person not being duly qualified to act as member or not having made, &c., the declaration," this must mean "member," (it cannot "person" not being "member,") "or being disabled from acting by any provision of this Act," acts, &c., he shall be liable to a penalty. Now the question is, whether a man who has been, but is not, a member, is within these provisions? I say "who has been," but in my judgment that might be left out. For I cannot see what having been a member has to do with it. How does it make any difference in the offence that a man acting who *is* not a member *was* so formerly, perhaps twenty years before. Why not as long back, if at all? I think, therefore, the question may be reduced to this. Whether a man who is not a member is within these provisions? First of all, why should he be? Why should a penalty be put on a man for doing what the members of the board can prevent his doing? His having no right to do so must be known to them, or some of them, if they do their duty. Is a man returned, but unseated on some inquiry for want of the requisite votes, subject to this penalty? He is not within the protection of the last clause of rule 70.

I see no reason, then, for holding such a person liable to a penalty. Then look at the language of rule 70: "Any person not being duly qualified to act." Does not that mean not having the qualification prescribed in rule 3? I cannot but think it does.

By that "a person shall not be qualified to be a member of a local board unless at the time of his election, and so long as he continues in office" he is a resident possessed of property, &c. If he had not this qualification when elected, or ceased to have some such afterwards, he is not qualified. But this defendant is qualified, and might have been re-elected before he voted. "The burden of proving qualification or of negativing disqualification by reason of non-residence," &c., "shall be on the defendant." But why also is it not on the defendant to prove that he was elected? It is said that what he has to prove is affirmative, and within his own knowledge, but so also is his having been elected. Then as to the words or "disabled from acting by any provision of this Act." That supposes that he is qualified; that he has taken the declaration, and therefore by implication that he is a member, but is disabled from acting. That is not this case. The words "disabled from acting" are satisfied by the concluding provisions of rule 64. I really can see no reason for the construction contended for. If the statute had said that any member of the board becoming party to a contract with it should be liable to a penalty and vacate his seat, I could understand it. But I cannot see why, if no penalty attaches to the entering into the contract except the loss of the seat, there should be a penalty for acting without re-election any more than if he had never been elected. It may be that the mischief contemplated by the statute will not be prevented. I should have thought the best way to do that would have been to make it penal, as I have said, for a member of a board to enter into a contract with it. I do not see much harm in the acting after a contract with it without re-election. Of course I am aware that it is desirable he should not act in the matter of his contract. But all acting is forbidden. The truth is it is difficult to apply the principle of the statute to a trifling case like this. I am quite unable to distinguish this case from *Lewis* v. *Carr.* (1) There the defendant had had an interest in a contract with the council. By s. 28 he lost his qualification during that time. One would think he ceased to hold office, though Baggallay, L.J., seems not to think so. But, whether or no, it was held that the defendant was not "disqualified" after he ceased to be interested in a contract. I admit I cannot distinguish *Nicholson* v. *Fields* (2), except, indeed, that it was decided on its own particular language. If it is in point here it was overruled by *Lewis* v. *Carr.* (1) Yet

(1) 1 Ex. D. 484.

(2) 7 H. & N. 810; 21 L. J. (Ex.) 233.

those who decided *Lewis* v. *Carr* (1) did not think they were overruling *Nicholson* v. *Fields*. (2) I say nothing about the statute now in question being penal, nor that it ought to be construed strictly. I think it ought to be construed rightly; I cannot see any reason for implying a penalty applicable to such a case as the present, viz., a case where a non-member acts.

Brett, L.J. I am sorry to say that I cannot agree with the judgment of the Lord Justice. My reasons are exceedingly short. If I could agree with that judgment conscientiously, I most certainly would, because I am of opinion that this litigation is most lamentable, if not discreditable. But it seems to me that the case is clearly within the 64th rule of the schedule. The defendant here was a member of the local board, and by that rule any member who in any manner is concerned in any bargain or contract entered into by such board, or participates in the profit thereof, shall cease to be such member, and his office as such shall thereupon become vacant. Now it seems to me that this person, being qualified in every other respect, is a person who, because he does something whilst he is so qualified and after he has been so elected, which he is forbidden to do by that enactment, is by that enactment made incapable of acting. The statute goes further than that, and says not only shall such person be incapable of acting, but he shall cease to be a member.

Now what is the consequence of that state of things? Rule 70 says, that " Any person who not being duly qualified to act as member,"—this person was qualified within that part of the rule—" or not having made and subscribed the declaration required of him by this Act "—that he had done—" or being disabled from acting by any provision of this Act, acts as such member." It seems to me that this case is precisely within those words; it is that of a person who is otherwise qualified, but who being disabled from acting by a provision of this Act has nevertheless acted as a member. I confess that this seems to me to be within the plain meaning of those words, and if those words do not apply to such a case as this, it seems to me that there is no other to which they can apply. I therefore think the plaintiff is entitled to succeed in this action, though it is one which he ought never to have brought.

---

(1) 1 Ex. D. 484.

(2) 7 H. & N. 810; 21 L. J. (Ex.) 233.

COTTON, L.J. The question in this case turns on two of the rules in the second schedule to the Public Health Act, 1875, and although this is a case where the plaintiff is suing for a penalty, yet, in my opinion, those rules, as every other instrument, ought to be construed fairly, not straining their meaning either for or against the defendant.

The question is whether the penalty is incurred under rule 70, and the point is whether the defendant is a person who was disabled from acting as a member by any provision of this Act (including, of course, any provision of the rules). In rule 64 there is a provision which clearly applies to him; he let out his horses to the board, and he received payment from the board for the use of his horses. I think, therefore, he was concerned in a contract entered into by the board.

As that is so, and as we all agree that the defendant came within the 64th rule, and therefore ceased to be a member, the question is whether that made him within the meaning of the 70th rule a person disabled from acting? In my opinion it did. He had been duly elected, he had the qualification necessary, and he had subscribed the declaration. He had, therefore, an apparent title to be on the board, but he had, according to the provisions of the 64th rule, ceased to be a member and was disabled from acting; that is to say, he was no longer de jure a member of the board. It is said that the words "disabled from acting," in rule 70, apply only to persons who are members, and that he is not a member. But I think that will not excuse the defendant, for, in my opinion, rule 70 applies to a person who when he is elected has a qualification, but who afterwards loses it and is not duly qualified at the time when he acts as a member. Therefore, in my opinion, with great respect to Lord Justice Bramwell, the appeal fails, and the defendant is liable under the 70th rule to the penalty which is there given.

I would only say one word as to the case of *Lewis* v. *Carr*. (1) That case was decided on a different statute, and on the construction of that statute the judges came to the conclusion that the disqualification was imposed by the statute only so long as the member was concerned in the contract. There were very different words in the statute in that case from those in the present statute, and that case is not therefore, in my opinion, applicable to the present one.

---

(1) 1 Ex. D. 484.

Appeal dismissed.

Solicitors for plaintiff: *Iliffe, Russell, Iliffe, & Laycock.*
Solicitors for defendant: *J. & E. Scott.*

W. P.

[IN THE COURT OF APPEAL.]

July 27.

WALLER *v.* LOCH.

Defamation—Privileged Communication—Charity Organisation Society.

A. interested herself in obtaining subscriptions for the relief of the plaintiff, a lady in distressed circumstances. B., who was interested in the case, applied to the defendant, the Secretary of the Charity Organisation Society, for information as to the plaintiff's character, and received an unfavourable report which, by leave of the secretary, she communicated to A. The subscriptions were thereupon withdrawn. The plaintiff then sued the secretary for libel. The society was formed for the purpose (inter alia) of investigating the cases of applicants for charitable relief:—

Held, that the report was a privileged communication, and that, in the absence of proof of malice, the action could not be maintained.

ACTION for libel.

At the trial before Grove, J., it appeared that the defendant was the Secretary of the Charity Organisation Society, one of the objects of which as stated in its circulars to be "The improvement of the condition of the poor by securing due investigation and fitting action in all cases and by repressing mendicity." The society consists of a federation of local district committees, and by one of its circulars it is stated that the inhabitants of each district, whether subscribers or not, are invited to refer to the committee all cases of applicants for charitable relief which require investigation. "If requested so to do it communicates the result of such investigation to the person desiring inquiry, and should he wish to undertake the case leaves it in his hands. In the absence of such wish the committee deals with each case to the best of its judgment and ability."

The plaintiff was the daughter of a deceased officer in the army, and was in distressed circumstances. A lady interested herself in obtaining subscriptions to make some provision for her, and obtained promises of contributions to a considerable amount. Another lady who was interested in the case applied to the society for information. The society communicated to her an unfavourable report on the case, which by their permission she communicated to the other lady. In consequence of this report the plaintiff lost the benefit of the subscriptions. She therefore commenced this action against the defendant, the secretary of the society.

The learned judge held the communication privileged, and left to the jury the question whether there was express malice. The jury found for the defendant. A rule for a new trial on the ground of misdirection and that the verdict was against the evidence was refused by the Divisional Court. The plaintiff appealed.

Tatlock, and *Rose Innes,* for the plaintiff. The communication was not privileged: *Martin* v. *Strong* (1), commented on in *Kine* v. *Sewell* (2), shews that the occasion was not one on which a privileged communication could take place. The lady who collected the subscriptions had made her inquiries before, and there was no reason to volunteer information to her.

[JESSEL, M.R.:—Surely if she found she had been misled she might make further inquiries, and answers to them would be privileged.]

The Charity Organisation Society had no such interest or duty in the case as entitled them to give information which would be privileged. *Botterill* v. *Whytehead* (3) is against the privilege.

[BRETT, L.J.:—There the information was volunteered.]

---

(1) 5 Ad. & Ell. 535.

(2) 3 M. & W. 297.

(3) 41 L. T. (N.S.) 588.

So it was here. The society volunteers to give the information to anybody.

JESSEL, M.R. I am of opinion that there should be no rule. The application is grounded on an allegation that the communication was not privileged. If it was privileged the plaintiff's case fails, for I am clear that there was no evidence from which a jury could reasonably infer actual malice.

Was then the communication privileged? The Charity Organisation Society was formed for the purpose of conferring on the public a great benefit by protecting the charitable and benevolent from being imposed upon, and by seeking out and recommending to them deserving objects of relief. No service can be much greater, whether as regards persons in need of charitable assistance or as regards persons charitably disposed. That being so, if a person desirous of bestowing charity, or desirous of information about objects on whom to bestow it, or desirous of recommending deserving objects to charitable persons, goes to this society to make inquiries, the answers of the society, if given bonâ fide, are, in my judgment, privileged. According to *Harrison* v. *Bush* (1) a communication which a person makes bonâ fide in discharge of a moral or social duty of imperfect obligation, is privileged. To which I may add, that such is the case where the person giving the information bonâ fide thinks that he is discharging a moral or social duty. It is not necessary in all cases that the information should be given in answer to an inquiry. In *Davies* v. *Snead* (2), Blackburn, J. says that "Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts; then if he, bonâ fide and without malice, does tell them, it is a privileged communication." Now, if the secretary believed that the lady to whom he gave the information in this case was making the inquiry in order to learn whether the plaintiff was deserving of assistance, with a view to relieving her or inducing other persons to relieve her, then he was discharging a moral or social duty in answering the inquiry, and was entitled to answer it.

(1) 5 E. & B. 344. 2 Jur 490

(2) Law Rep. 5 Q. B. 608, 611.

Brett, L.J. The jury having found that there was no express malice, a finding, the correctness of which I see no reason to doubt, then, if the communication was privileged it is immaterial whether the justification that the alleged libel was true can be supported or not. I agree that the communications were privileged. I think that the definition by Blackburn, J., in *Davies* v. *Snead* (1) is the best, it leaves out all misleading words, saying nothing about "duty," and states in plain terms what I conceive to be the true rule. Then do the facts of this case bring it within the rule? It seems to me that they do, if the defendant reasonably believed that the question was asked in order to enable the questioner to decide whether relief should be given or should be continued to be given. It is not material whether the information was really wanted for that purpose or not, it is enough if the defendant reasonably supposed the questioner to be asking it for that purpose. He could not reasonably suppose that the question was asked for any other purpose, and that being so, I think it was right and for the benefit of society that he should answer it. If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered, and if answered bonâ fide and without malice, the answer is a privileged communication.

Cotton, L.J. The material question is whether the answer given by the defendant was a privileged communication. Different definitions have been given of what constitutes a privileged communication, and though Brett, L.J. objects to the use of the word "duty," I am disposed to say that it is a communication made in discharge of a duty legal, moral, or social—a legal duty or a duty of imperfect obligation. A duty of imperfect obligation attaches on every one to do what is for the good of society. In that sense it is the duty of those who have knowledge as to persons seeking charitable relief to communicate it, when asked by persons who wish to know whether the applicants are deserving objects. The secretary might well believe that he was asked for that purpose. The occasion then was a privileged occasion on which

(1) Law Rep. 5 Q. B. 608, 611.

he was at liberty to give such information as he had. The only question then is whether there was malice. As to this there is no ground for interfering with the finding of the jury that there was not.

Judgment for the defendant.

Solicitor for plaintiff: *George Johnson.*

H. C. J.

[IN THE COURT OF APPEAL.]

July 27.

RICHARDS *v.* CULLERNE.

County Court—Jurisdiction to enforce Interlocutory Order by Committal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 89, *Order XLII.*, *r.* 5.

The power of a county court under the Judicature Act, 1873, s. 89, in actions within its jurisdiction to enforce obedience to its orders by committal, extends to interlocutory as well as to final orders.

10 QBD 506

APPEAL by the defendant from an order of the Queen's Bench Division, discharging a rule which called on the plaintiff and the judge of the county court of Wiltshire to shew cause why the judge should not hear and adjudicate upon an application for the committal of the plaintiff.

It appeared that the action was for a debt of 50*l.*, and on the 10th of December, 1880, the judge of the county court made an order by consent that all matters in difference in the cause should be referred to arbitration, and that the plaintiff should make copies of the books, documents, and accounts, set out in his affidavit of documents, and ordered to be produced by him under an order of the 15th of October, 1880, and should produce such copies and the originals to the registrar and the defendant's solicitor on the 18th of December, 1880, to be examined by them at such time as to the correctness of the copies, and that such copies should be then handed to the defendant's solicitors, the defendant to pay to the plaintiff such costs as should be allowed by the registrar on taxation for making such copies. It was further provided that the award of the arbitrator should be enforced as the judgment in the cause.

The plaintiff did not attend on the 18th of December to produce the copies and books mentioned in the order, and he gave notice to the registrar that he should not attend.

On the 3rd of February, 1881, a copy of the order of the 10th of December, 1880, with an indorsement pursuant to the County Court Rules, 1875, XIX., 28, was duly served on the plaintiff, and upon his non-compliance with the order a notice was served upon him, that on the 18th of February the defendant would apply for an order for his committal. On that day the plaintiff appeared in person, and stated to the Court that he would not comply with the order. The deputy judge, after taking time to consider, refused to commit the plaintiff, on the ground that the order was not made under s. 89 of the Judicature Act, 1873, but was made by the county court under s. 50 of the Common Law Procedure Act, 1854, as applied by the Order in Council, and this section gave no power to enforce the order by committal. The rule above mentioned was obtained, and the plaintiff appeared to shew cause; but some of the material documents having been mislaid in the office where they had been left for drawing up the rule the defendant was unable to support his case, and Denman and Williams, JJ., discharged the rule. The documents in question having subsequently been found, the defendant appealed.

J. C. Bigham, for the defendant. There is jurisdiction to commit under the Judicature Act, 1873, s. 89, and Order XLII., rule 5: *Ex parte Martin.* (1) The distinction taken by the deputy judge that this is not a final order is unsubstantial.

The plaintiff in person supported the decision appealed from on the grounds taken by the county court judge.

JESSEL, M.R. The only point on which we ought to give an opinion in this case is whether the rule of *Martin* v. *Bannister* (2) is to be confined to the enforcing of final judgments. Looking at the language of the Judicature Act, 1873, s. 89, I can see no reason for so confining it, the words "any proceeding" being applicable to any stage of an action. *Martin* v. *Bannister* (2) decides that the language of s. 89 covers a breach of an injunction, and, in my

---

(1) 4 Q. B. D. 212, 491.

(2) 4 Q. B. D. 491.

1881

RICHARDS
v.
CULLERNE.

opinion, it applies to every case where, if the action were in the High Court, a party could be committed for disobedience. The appeal must be allowed.

BRETT, L.J. I also am of opinion that the appeal must be allowed. It is not disputed that the county court had jurisdiction to make the order which has been disobeyed, the only question is what is the remedy for a breach of it? In *Martin* v. *Bannister* (1) it was decided that the county court had power to commit for breach of a final order. Does this power extend to the breach of an order made in the course of an action? The words of s. 89 of the Judicature Act, 1873, appear to me clearly to import that the county court has the same power as the High Court in regard to every step in the action. The words are that the Court "shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such Court such relief, redress, or remedy, &c., as might and ought to be done in the like case by the High Court of Justice." This plainly means "in any proceeding relating to a cause of action within its jurisdiction." The county court then has the same power as the High Court at every stage.

COTTON, L.J. I am of opinion that this case is governed by *Martin* v. *Bannister*. (1) A distinction has been taken that the judgment in that case was a final one, whereas here the order which has been disobeyed is an interlocutory order made in the course of the action. But the decision in that case did not turn at all upon the fact that the order was a final one, but upon this, that "remedy" included not only the power to make orders, but the power to enforce them, and that reason applies just as much to interlocutory as to final orders. I am, therefore, of opinion that the judge must be directed to proceed to hear and adjudicate on the motion for committal.

Judgment for the defendant.

Solicitors for defendant: *G. & P. Eyre & Co.*

H. C. J.

---

(1) 4 Q. B. D. 491.

1881
April 11.

[IN THE COURT OF APPEAL.]

GATHERCOLE *v.* SMITH.

Practice — Pleading — Counter-claim — Set-off — Incumbents Resignation Act, 1871 (34 & 35 *Vict. c.* 44), *s.* 10.

11 QBD 466

To a claim in an action brought to recover the arrears of a pension due by virtue of the Incumbents Resignation Act, 1871, the defendant, by way of set-off and counter-claim, pleaded that a larger sum than the amount of pension was due to him from the plaintiff upon a judgment, and he claimed to recover the balance:—

Held, by Baggallay and Lush, L.JJ., that as there can be no set-off to a pension created under the Incumbents Resignation Act, 1871, the set-off and counter-claim must be dismissed:

By Bramwell, L.J., that the plaintiff must have a judgment for the arrears of the pension owing to him, but that the defendant was entitled to a separate and independent judgment for the amount due under the set-off and counter-claim.

APPEAL by the plaintiff from the order and judgment of Lord Coleridge, L.C.J.

The facts of the case are sufficiently stated in the judgment of Lush, L.J.

March 10, 28. *Chitty, Q.C.*, *Petheram, Q.C.*, *W. W. Cooper*, and *R. A. McCall*, for the plaintiff.

Bompas, Q.C., *Smart*, and *Howard Smith*, for the defendant.

The arguments are sufficiently mentioned in the judgments of the Lords Justices hereinafter set forth.

Cur. adv. vult.

April 11. The following judgments were delivered:—

LUSH, L.J. This is an action by the late incumbent of the vicarage of Chatteris, in the Isle of Ely, to recover 225*l.*, being the first of the half-yearly payments of the pension assigned to the plaintiff under the Incumbents Resignation Act, 1871, out of the revenues of the benefice upon his vacating the living under the provisions of that Act. The defendant is his successor, and the present incumbent of the vicarage.

The statement of defence sets up that in August, 1845, the plaintiff being then owner of the advowson, mortgaged it to one Hawkins for 24,500*l.*, and that he secured the due payment of the amount by a warrant of attorney bearing even date with the mortgage, upon which judgment was signed; that afterwards default being made in payment, a writ of sequestration was issued and certain amounts realised under it; that the mortgage and benefit of the judgment afterwards and before the resignation of the plaintiff became by assignment vested in the defendant; that the judgment to the amount of 20,000*l.* remains unsatisfied, and the defendant claims to set off the amount so due upon the judgment against the claim of the plaintiff in the action.

Lord Coleridge directed an account to be taken how much of the original debt and interest had been paid off under the sequestration or otherwise, and that judgment with costs should be entered for the defendant if a sum remained unpaid larger than the plaintiff's claim. The official referee having found that no part of the original debt had been paid off, and that the sum remaining due was 28,122*l.*, it was adjudged that the defendant recover the balance after deducting the 225*l.* claimed for the half-year's pension. The plaintiff appeals against this judgment. In June, 1879, the plaintiff brought another action for recovery of three other half-yearly payments of the pension. The defendant pleaded in that action the same defence, and claimed in like manner to set off the judgment against the said arrears. The Master of the Rolls held that under the 10th section of the Incumbents Resignation Act, 1871, which declares that the pension shall be a charge upon the revenues of the benefice and recoverable as a debt at law or in equity from the incumbent by the retired clerk, his executors, administrators, or assigns, but "such pension shall not be transferable at law or in equity," it could neither be assigned nor incumbered directly or indirectly, and consequently that the judgment debt could not be set off. And his Lordship dismissed the set-off, or as it was called in the alternative, the counter-claim, and gave judgment for the amount of the arrears, with interest and costs as well of the alleged counter-claim as of the action. The defendant moved, by way of appeal, that this judgment might be reversed so far as it directed that the defendant's counter-claim be dismissed with costs, and that judgment be entered for the plaintiff, and prayed that an account may be taken of what was due upon the judgment, and that the defendant might be at liberty to set off the amount and have judgment for the balance. The appeal came on for hearing before the Divisional Court of the Court of Appeal sitting at Lincoln's Inn, in the course of the last month. Before the hearing of the appeal, and upon an application by the plaintiff, and both parties undertaking, so far as the points in the appeal were the same, to be bound in the appeal in the action in the Common Pleas by the decision of the Court of Appeal in the appeal from the judgment of the Master of the Rolls, all further proceedings in the Common Pleas action were stayed pending such decision. The Court of Appeal unanimously affirmed the judgment of the Master of the Rolls, and dismissed the appeal with costs. (1) So that it stands upon the judgment of this Court of Appeal by one of its Divisional Courts, that the set-off is dismissed with costs, and that the plaintiff is entitled to judgment for the full arrears of the pension and interest and the costs of the action. Notwithstanding this judgment and the undertaking I have mentioned, the defendant invites this Division to overrule that portion of the judgment of this same Court which dismisses the set-off with costs, and asks for judgment for him upon that set-off. He does not now claim to set it off against the pension, but he says that he is entitled to have judgment upon his set-off though he can make no use of it in this action. He made the same application to the Master of the Rolls, but without success. (2) I am utterly unable to discover any ground upon which this Division of the Court of Appeal can be asked to give such a judgment.

In the first place, it is not competent to this Division to overrule in any respect the judgment of the other Division. No new facts are introduced into this appeal. It is true that as far as my recollection goes—for I was one of the judges who sat on that appeal—this claim to have judgment entered for him, though it could not be set off, was not specifically taken. It was taken, as I have just said, before the Master of the Rolls and refused; whether the defendant's counsel in the Court of Appeal overlooked it or abandoned it, is, I think, immaterial. So long as that judgment stands, it is binding upon this Division in its entirety.

---

(1) 17 Ch. D. 1.

(2) 17 Ch. D. 4, 5.

Secondly, the defendant's undertaking precludes him from raising the question. The point in the appeal, whether the pension is or is not subject to the judgment, and how the set-off pleaded was to be dealt with, is common to both cases.

Thirdly, the defence is a set-off of an unsatisfied judgment to a larger amount than the sum claimed. Calling it a counter-claim does not make it different from what it is. It is a claim which might have been set off under the statute, 2 Geo. 2, c. 22. That Act relieved a party who owed another a debt from the obligation to pay and seek his remedy by a cross-action, by enacting that where there are mutual debts one may be set off against the other. If the debt due to the defendant exceeded that due from him to the plaintiff, that Act gave him no remedy for the excess. He must have sued for that in a separate action. The Judicature Act alters this so far as to authorize the Court to give judgment for the excess. But that is all. The set-off is not an independent action. It is still a defence and nothing more. If the plaintiff before the Judicature Acts chose to discontinue his action the defendant could not claim to have his set-off tried. It fell with the action to which it was and still is an adjunct. Accordingly the Master of the Rolls decided in *Vavasour* v. *Krupp* (1) that a counter-claim could not be proceeded with after the plaintiff had discontinued his action. The principle is, that if there is nothing against which the matter pleaded can be set up by way of relief, the set-off falls to the ground. I am at a loss to conceive what judgment can be given upon this set-off under the circumstances, except that it be struck out or disallowed or dismissed. It matters not what form of words is used. The meaning is, that no effect can be given to it in this action. I am, therefore, of opinion that the judgment of the Court below ought to be reversed and, in accordance with the judgment of the Court at Lincoln's Inn, that judgment be entered for the plaintiff for 225*l.* with interest thereon at the rate of 5 per cent. per annum, and costs of this action, including therein the costs occasioned by the set-off, together with the costs of this appeal. Inasmuch as upon a

11 QBD 466

---

(1) 15 Ch. D. 474.

second hearing Mr. Chitty was brought in to argue a point in which he failed, I think that the costs occasioned by his appearance ought not to be allowed.

BRAMWELL, L.J. It is clear that the plaintiff must have power to issue execution upon a judgment for 225*l.*, and that this power must be treated as independent of any claim which the defendant may have against him.

The question then arises, what is to become of the counter-claim? The defendant asks for a judgment upon it in his favour. It is argued for the plaintiff that the defendant ought not to have it upon two grounds: first, because he is concluded by the judgment in the action in the Chancery Division (this of itself, if it were true, would be sufficient to preclude him); secondly, because he has agreed to be bound by it. For the defendant it is contended that he has not agreed to be bound by it.

As to the first point relied upon by the plaintiff, it seems to me that it was not decided by the Master of the Rolls; what his Lordship did decide was, that although an action may be brought upon a judgment, yet successive actions cannot be brought upon the same judgment, and actions brought under such circumstances are liable to be stayed upon summons as frivolous and vexatious; and therefore that the counter-claim must be dismissed. (1) But whatever the Master of the Rolls may have decided, it was not decided by the Court of Appeal when the appeal from his judgment came on to be heard; this I understand from the statement of Lush, L.J. to have been the result of the proceedings before the Court of which he was a member. How then can it be said that we are bound by a previous decision of the Court of Appeal, or that the defendant has agreed to be bound by the decision of the Court of Appeal, as to the question now before us upon the counter-claim?

Another objection to the defendant's right to get judgment upon the counter-claim was argued by Mr. Chitty: it was that the judgment had ceased to be binding owing to the manner in which the property had been dealt with. We made short work of that argument, because it was manifest that the judgment relied upon

(1) 17 Ch. D. 4, 5.

by the defendant was still standing and was valid: so that he can still have execution upon it. It is also suggested that even if this had been a counter-claim upon a promissory note, yet the defendant is not entitled to judgment upon it. I have a difficulty in understanding the argument; but I wish to speak of it with respect, because great stress has been laid upon it by Lush, L.J. The argument is, that the counter-claim of the defendant is in truth a set-off. It is, in effect, contended that a set-off supposes that there is something against which the defendant's claim can be set off; and that when there is nothing against which it can be set off, the defendant's claim fails altogether. If I understand the argument rightly, it will extend even to a case of this sort: suppose an action for specific performance of a contract to grant a lease of a house, in which the defendant denies the right of the plaintiff to the lease, and by way of set-off or counter-claim pleads that the plaintiff owes him 100*l.* for breach of contract in respect of the house: if the plaintiff does not make out his right to specific performance, the defendant will fail also, inasmuch as there is nothing against which his claim can be set off: but even if the plaintiff succeeds, as there can be no set off of damages against a claim for specific performance, the set-off or counter-claim cannot be maintained, for no balance can be struck between the conflicting rights of the parties. As I understand this argument, I cannot agree with it. I will refer to the words of the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 7: it enacts that "the High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal and equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." So far as the point before us is concerned, I think that the legislature has made no difference between a set-off and a counter-claim. Then by Rules of Court, 1875, Order XIX., rule 3, "a defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sounds in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim." To my mind that provision has the following meaning: a defendant may set up in the action any claim which he may have against the plaintiff, and obtain the appropriate judgment upon it. If the character of the claims is such that the one cannot be set off against the other, that is to say, if a balance cannot be struck between them, and if judgment cannot be given for the balance, nevertheless a final and appropriate judgment may be given upon each claim; so that in the present case, if the defendant had relied upon a promissory note by way of counter-claim, the plaintiff would have been entitled to judgment and execution for so much of the pension as is due to him, and the defendant would have been entitled to judgment upon the promissory note. Then by Order XIX., rule 8, "every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counter-claim made or relief claimed by the defendant in his statement of defence." Surely this rule must apply to a set-off as well as to a counter-claim, and it is a strong argument to shew that a set-off and a counter-claim are the same. In Order XX. such language is used in the words of the rules as to make it manifest that the terms "set-off" and "counter-claim" are used indifferently. It follows that if a balance cannot be struck between the conflicting claims, separate judgments may be given, and judgment must be pronounced on both the original and the cross-claims. I do not say that the plaintiff might not have successfully applied at chambers to strike out the counter-claim; but it remains upon the pleadings, and we must dispose of it. If we pronounce that the counter-claim is not proved, we shall say that which is not true; if we say that it is insufficient in point of law, we shall again say what is not true. It seems to me, therefore, that the defendant ought to have judgment upon the counter-claim. I think, however, that the defendant is not entitled to costs. By 43 Geo. 3, c. 46, s. 4, a person who brought an action upon a judgment was not entitled to costs. I think that the same rule ought to be applied since the Judicature Acts have been passed. The only advantage which the defendant has obtained by setting up the judgment in the counter-claim is, that he can issue execution upon it in his own name: but this is not a valid reason why he should have costs. The defendant has practically failed in his defence, and, in the exercise of the discretion of the Court, he ought not to have costs.

BAGGALLAY, L.J. I have felt very considerable difficulty in dealing with the question as to the counter-claim, and that difficulty is increased by the circumstance that a difference of opinion exists between my colleagues upon the bench.

It will be useful to consider the nature of the two actions which have been respectively brought in the Common Pleas Division and in the Chancery Division. In 1877, Mr. Gathercole availed himself of the provisions of the Incumbents Resignation Act, 1871, and he thereby became entitled to an annual pension of 450*l.* payable half yearly. When the first half-year's payment became due and was not met by Mr. Smith, Mr. Gathercole commenced an action against Mr. Smith, and the latter has set up a judgment for more than 20,000*l.* obtained against Mr. Gathercole. The object was to set off a portion of the sum due upon that judgment against the amount due to him by way of pension, and to recover the balance from him. It does not appear very clearly whether the question now before us was argued before Lord Coleridge, and whether the provisions of the Incumbents Resignation Act, 1871, s. 10, were discussed. When he tried the action in the Common Pleas Division, probably it was not, for he merely directed an account to be taken how much of the original debt and interest had been paid off under the sequestration or otherwise, and that judgment with costs should be entered for the defendant, if a sum remained unpaid larger than the plaintiff's claim. This was in effect a direction that an account should be taken on the basis of a set-off. The official referee having made a report that no part of the original debt had been paid off, Lord Coleridge gave judgment for the defendant for the sum of 27,897*l.*, being the balance due to the defendant after deducting from the sum of 28,122*l.* the sum of 225*l.* His Lordship thereby availed himself of Rules of the Supreme Court, 1875, Order XXII., rule 10, which provides that "where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case." That is the judgment from which the present appeal is brought. Another action was commenced in the Chancery Division by the same plaintiff against the same defendant, to recover the second, third, and fourth half-yearly payments of the pension which remained unpaid to the plaintiff, and a similar counter-claim and set-off was relied upon by the defendant. Before the Master of the Rolls the question whether a pension under the Incumbents Resignation Act, 1871, was inalienable was raised: he held that it was inalienable, and that there could be no set-off against it, and he dismissed the counter-claim. (1) It does not appear clear from the language of his judgment, whether he dismissed the counter-claim upon the ground that the pension is inalienable, or whether he did so on the ground that the defendant had obtained judgment upon the counter-claim in this action from Lord Coleridge. From reading the judgment of the Master of the Rolls I rather infer that he gave judgment against the defendant on the latter ground. However, the whole question came before this Court upon appeal from his judgment, and the defendant had meanwhile entered into an agreement that he would accept the decision of the Court as binding upon him in the action in the Common Pleas Division, so far as the points in the appeal were the same. I have looked through the judgments of the Lords Justices (2), and it does not appear that any other question was raised than whether the pension was inalienable, and that no set-off, or judgment pleaded as a set-off, could be pleaded against a claim to recover it; if this were all, it might be open to us to give judgment upon an independent counter-claim, provided we thought that the circumstances warranted us in doing so. I do not feel satisfied that a set-off and a counter-claim are the same. I do not think that the Rules of Court intended that they should be so regarded in every instance. I think that in some instances a set-off may fail, whilst a counter-claim may succeed; but what we have to consider is whether judgment can be given in favour of the defendant upon a counter-claim, when it has been already decided that the same facts pleaded by way of set-off do not create a valid defence. Upon consideration, I think that in this case the defendant relies upon a counter-claim by way of set-off, and the alleged counter-claim is in fact nothing more than a set-off. Now it was held by this Court upon appeal from the Chancery Division, that the judgment obtained against the plaintiff could not be pleaded by way of set-off and must be rejected. It is true that the question whether the defendant may not be entitled to an independent judgment upon his counter-claim, does not appear to have been fully argued upon the appeal from the judgment of the Master of the Rolls; but I think that the language of the Lords Justices points to the conclusion that in no way can a retired incumbent be deprived of the pension. James, L.J. (1), says, in speaking of the word "transferable," and of the meaning to be put upon it: "It appears to me that very word was used by the legislature not only to prevent the incumbent from assigning himself, but for preventing any transfer by operation of law in invitum —not only to prevent a voluntary dealing by an incumbent with an annuity, but to prevent the annuity vesting in a trustee in bankruptcy, or being seized or attached under a garnishee order by an execution creditor, or otherwise transferred. If the right was not to be transferred in that way, it cannot make any difference in substance that the person who seeks to say that he has got the right to it now, is the person who has to pay the money. That seems to me to be a mere accident, which does not interfere with the substance of the matter; and it must be treated as if somebody else had got this judgment, or as if the debt had been assigned to somebody else, and he was asking to enforce a

---

(1) 17 Ch. D. 4, 5.

(2) 17 Ch. D. 6, 7, 8, 9, 10.

---

(1) 17 C. D. 7.

1881

GATHERCOLE v. SMITH.

Baggallay, L.J.

garnishee order against the present incumbent to restrain payment to the old incumbent."

I think that we are bound by the judgment of this Court upon the appeal from the Chancery Division, and that the judgment of Lord Coleridge must be reversed.

Judgment reversed.

Solicitor for plaintiff: *J. Richardson, for W. Richardson, Chatteris.*

Solicitors for defendant: *Parkers.*

J. E. H.

March 10.

[IN THE COURT OF APPEAL.]

WILKINSON & CO. v. UNWIN.

Bill of Exchange—Indorser and Indorsee—Reindorsement—Circuity of Action.

8 Asp Cas 734 -735.

The son of the defendant bought goods of the plaintiffs, and required credit to enable him to pay. It was agreed that the defendant should become surety for the price of the goods. The plaintiffs accordingly drew two bills of exchange on the son of the defendant, and indorsed them to the defendant, who re-indorsed them to the plaintiffs. The bills having been dishonoured at maturity:—

Held, that the plaintiffs were not precluded from suing the defendant on the ground of circuity of action, and that they could recover the amount of the bills from the defendant.

ACTION upon two bills of exchange drawn by the plaintiffs on and accepted by Edwin Unwin, the one for 51*l.* 13*s.* 4*d.* at three months, and the other for 60*l.* at four months.

At the trial it appeared that Edwin Unwin had requested the plaintiffs to supply him with goods, and to give him some credit for the price of them by taking bills of exchange, and it was agreed between the plaintiffs and Edwin Unwin that he should procure his mother, the defendant, to indorse the bills as surety for the price of the goods. The plaintiffs accordingly supplied the goods and drew and indorsed the bills sued upon, and the defendant indorsed them to the plaintiffs. It was alleged for the plaintiffs that the defendant indorsed the bills with the intent of thereby becoming surety for the due payment of the bills; for the defendant it was alleged that she indorsed the bills in the ordinary way and to the ordinary extent incident to an indorsement, and without any intention to forego any rights or remedies ordinarily incident to an indorsement. The bills of exchange were dishonoured at maturity, and the plaintiffs were unable for some time to find the defendant's address, but on finding it they gave her notice of dishonour.

The jury found that the plaintiffs had shewn due diligence in trying to find out the defendant's address, and to give her notice of dishonour; that the defendant did not put her name on the bill with the ordinary intention, but that she had agreed with the plaintiffs to become surety to them for the price of the goods supplied to Edwin Unwin, and put her name on the bill to become surety to the plaintiffs; and that no payment on account of the bills had been made by the defendant.

BOWEN, J., gave judgment for the plaintiffs.

The defendant appealed.

McLeod Fullarton, for the defendant.

The argument is sufficiently noticed in the judgments of the Lords Justices.

The following cases were cited in addition to those mentioned in the judgments: *Bishop* v. *Hayward* (1); *Abrey* v. *Crux* (2); *Goupy* v. *Harden*. (3)

Goodman, for the plaintiffs, was not called upon to argue.

BRAMWELL, L.J. I think that this judgment must be affirmed. It has been established that if the indorser of a bill of exchange subsequently becomes the indorsee, he can maintain no action against the intermediate indorsers, because he would himself be liable to them by reason of his antecedent indorsement. But there are several other cases which have decided that, if the holder of the bill would not be liable to the indorser whom he is suing by reason of any previous indorsement of his own, he may enforce his claim because no circuity of action arises; the holder of the bill may always shew such circumstances as do away with any liability by reason of his previous indorsement. That has been established by numerous decisions. Notwithstanding Mr. Fullarton's argument, I have no doubt that this action is maintainable. It is alleged by the plaintiffs that the bills of exchange sued on were indorsed by the defendant with the intention of becoming surety for the price of goods supplied to Edwin Unwin. The defendant has alleged that she indorsed the bills in the ordinary way and without any intention to forego her remedies against the plaintiffs as indorsers. The jury have found that the defence to the action is untrue, and they have said that she intended to make herself liable. It is clear that upon this finding she could not have maintained any action against the plaintiffs, if they had indorsed away the bills of exchange sued upon, and if the indorsees had compelled the defendant to pay the amount. It has been argued by Mr. Fullarton, that the agreement relied upon by the plaintiffs must be proved by a memorandum in writing because the contract is one of suretyship. The contract, however, is not within the words or the reason of the Statute of Frauds. If the buyer of goods accepts a bill drawn upon him for the price by a surety who afterwards indorses it to the seller, the surety cannot refuse to pay the amount upon default of the principal debtor, because the agreement under which the bill was signed was not in writing. The liability of the defendant cannot be explained away in the manner suggested. The only difficulty, which I have felt, is that some expressions in the opinions of the Lords in *Steele* v. *McKinlay* (1) may be inconsistent with the reasoning of my judgment in this case; but I am satisfied that it was not the intention of the House of Lords to overrule either the three English cases which have been mentioned, namely, *Wilders* v. *Stevens* (2), *Smith* v. *Marsack* (3), and *Morris* v. *Walker* (4); or the two cases decided in the Supreme Court of New York: *Seabury* v. *Hungerford* (5), and *Hall* v. *Newcomb.* (6)

---

(1) 4 T. R. 470.

(2) Law Rep. 5 C. P. 37.

(3) 7 Taunt. 159.

BAGGALLAY, L.J. In this case the question arises upon the judgment entered upon the findings, and it is not now disputed that the findings are correct. The defendant is an intermediate

(1) 5 App. Cas. 754.
(2) 15 M. & W. 208.
(3) 6 C. B. 486.
(4) 15 Q. B. 589.
(5) 2 Hill (N.Y.) 80.
(6) 3 Hill (N.Y.) 233.

indorser, and the position of the parties when there has been a reindorsement is thus described in Byles on Bills, 12th ed. ch. xi. p. 155: "If a bill be reindorsed to a previous indorser, he has, in general, no remedy against the intermediate parties, for they would have their remedy over against him, and the result of the actions would be, to place the parties in precisely the same situation as before any action at all. But where a holder has previously indorsed, and the subsequent intermediate indorser has no right of action or remedy on that previous indorsement against the holder, there are cases in which the holder may sue the intermediate indorser." The object of the rule of law is to prevent a circuity of action. Primâ facie, when the holder of the bill is likewise a previous indorser, no action can be maintained; but then, as has been pointed out in the work which I have cited, certain exceptions exist to the general rule. *Wilders* v. *Stevens* (1), *Smith* v. *Marsack* (2), and *Morris* v. *Walker* (3) are instances of these exceptions. I think that what Mr. Fullarton has pointed out with respect to them is very important. They were all cases decided upon the pleadings, and this creates a difference between them and *Steele* v. *M'Kinlay.* (4) In that case all the facts were before the House of Lords, and it was held that a written contract was necessary. I was much impressed by the argument which has been addressed to us, and under other circumstances there might be great force in the contention that the agreement put forward by the plaintiffs is not in writing; but I think that the defendant is precluded by the findings of the jury from raising the defence upon which she wishes to rely. They have found that she indorsed the bills of exchange in order to make herself liable as surety for the debt due from her son.

Upon this ground, I think that the appeal must be dismissed.

BRETT, L.J. The verdict and the judgment have proceeded upon the ground that the defendant was an indorser, and if this were an ordinary case of indorser and indorsee, no doubt the verdict and the judgment would be right, for primâ facie no consideration is needed to support an indorsement. However a difficulty was raised as to the plaintiffs' right to recover, and the objection was based on the ground that before the indorsement to the plaintiffs by the defendant the plaintiffs themselves had been parties to the bill. At first sight this seems a fatal objection; but the effect of the previous indorsement by the plaintiffs may be destroyed. In certain cases relating to mercantile law the objection to the right to recover was raised upon the pleadings; but circuity of action was negatived; and the moment that that is negatived the objection is destroyed. If it is shewn that no consideration existed for handing the bill to the defendant, the circuity of action is taken away. In *Morris* v. *Walker* (1) the objection was taken away by shewing that the note was indorsed by the plaintiff without any consideration, and the indorsement was in fact for the accommodation of the defendant; therefore all objection on the ground of circuity of action was destroyed. It has been contended that the only evidence of a consideration was the defendant's promise to become a surety for her son, and that as this promise was not in writing the indorsement was not binding upon the defendant. But the plaintiffs are not suing upon a guarantee; the case is not within either the words or the spirit of the Statute of Frauds, s. 4. Moreover, verbal evidence of the consideration was admitted, and the complaint ought to have been made to the High Court; but the objection was not sustainable, and the defendant has in truth lost nothing by the omission to apply to that tribunal. It has been contended that the cases which support the contention for the plaintiffs were wrongly decided, and that the law as laid down in *Britten* v. *Webb* (2) must in all cases be applied. But it seems to me that *Britten* v. *Webb* is quite distinguishable from the decisions which support the contention for the plaintiffs. It has been argued that *Steele* v. *M'Kinlay* (3) shews that when all the facts are proved at the trial, it becomes necessary to give evidence of an agreement in writing; it seems to me that that case has nothing to do with the present. It was there held that the mere fact of a person writing his name on the back of a bill does not make him acceptor, when the names of other parties appear as acceptors. This point does not affect the question before us. When this case was tried before Bowen, J., he acted upon the principles of the law merchant, and I am of opinion that his judgment was quite right.

---

(1) 15 M. & W. 208.
(2) 6 C. B. 486.
(3) 15 Q. B. 589.
(4) 5 App. Cas. 754.

---

(1) 15 Q. B. 589.
(2) 2 B. & C. 483.
(3) 5 App. Cas. 754.

Judgment affirmed.

Solicitors for plaintiffs: *G. & W. Webb.*
Solicitor for defendant: *W. Moon.*

J. E. H.

[IN THE COURT OF APPEAL.]

March 18.

MARSDEN AND WIFE *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Practice—Appeal—Interlocutory Order—Appeal from Order of Judge at Trial depriving successful Party of Costs—Jurisdiction of Divisional Court.

At the trial of an action the jury found for the plaintiffs for a sum exceeding the amount which the defendants had paid into court; the judge thereupon gave judgment for the plaintiffs without costs. The High Court of Justice afterwards made an order that the plaintiffs should have their costs. The defendants applied to the Court of Appeal to annul the order of the High Court after the time had elapsed for appealing against an interlocutory order:—

Held, that the order of the High Court was made on an appeal from a final judgment, and that the application to the Court of Appeal was not too late; but

Held, that the High Court had no jurisdiction to entertain an appeal from a final judgment, and that the order giving the plaintiffs their costs must be annulled.

THIS was an action for injury to the female plaintiff through the defendants' negligence. The defendants paid 100*l.* into court, and the jury found for the plaintiff for 5*l.* beyond the sum paid into court. Brett, L.J., who was the judge presiding at the trial, thereupon said, without any application having been made to him, that he should deprive the plaintiffs of costs, and gave judgment for the plaintiffs for 105*l.* without costs. The defendants' counsel was present, and would have applied for an order to deprive the plaintiffs of costs if he had not been anticipated by the Lord Justice. The plaintiffs' counsel was also present and said nothing, but applied two days after to the Lord Justice to reconsider his decision as to costs; he however refused to alter it.

1881

MARSDEN
v
LANCASHIRE
AND
YORKSHIRE
RAILWAY CO.

The High Court of Justice afterwards ordered that the plaintiffs should have their costs. The defendants, after the time had elapsed for appealing from an interlocutory order, applied to this Court to annul the decision of the High Court.

D. French, for the plaintiffs. There is a preliminary objection to the hearing of this appeal. The order of the High Court related to the costs of the action, and was therefore interlocutory; the present appeal is too late. An order for the appointment of a receiver after judgment is interlocutory: *Smith* v. *Cowell* (1); and it follows from *Collins* v. *Welch* (2) that an order for costs after judgment is also interlocutory.

[LORD SELBORNE, L.C. We are of opinion that the order of the High Court was not interlocutory; that order varied the judgment, and we are in effect hearing an appeal from the judgment in the action. It is not like an appeal from an order enforcing the judgment by execution, which may be interlocutory. The appeal is not too late.]

Aspland (*Gully, Q.C.*, with him), for the defendants. The judge at the trial had jurisdiction to deprive the plaintiffs of costs; *Collins* v. *Welch* (2) and *Turner* v. *Heyland* (3) are conclusive as to this question. Further, there was no right of appeal from the order of Brett, L.J.; there can be no appeal from an order as to costs, except by leave, and in the present case no leave was given; the exercise of the discretion of the Lord Justice cannot be reviewed: Supreme Court of Judicature Act, 1873, s. 49.

[LORD SELBORNE, L.C. Order LV. directs that when an action is tried before a jury, "the costs shall follow the event, unless upon application made at the trial for good cause shewn," the judge shall otherwise order. The question is, whether these words do not put a limit upon the judge's discretion.]

The judge at the trial has all the facts before him, and can form the best judgment as to whether costs should be allowed: *Harnett* v. *Vise.* (4) At all events the order as to costs formed part of the judgment, and the appeal should have been brought to this Court and not to a Divisional Court.

(1) 6 Q. B. D. 75.
(2) 5 C. P. D. 27.
(3) 4 C. P. D. 432.
(4) 5 Ex. D. 307.

D. French, for the plaintiffs.

[LORD SELBORNE, L.C. We wish the plaintiffs' counsel to argue the question, whether the application for costs ought not to have been made direct to this Court: it was in reality an appeal from the judgment of Brett, L.J.]

The application was not an appeal from the judgment. In *Baker* v. *Oakes* (1) the application was made to the Divisional Court.

[LORD SELBORNE, L.C. In that case the question was as to the jurisdiction of the judge who tried the action to make an order as to the costs, whilst he was sitting at chambers.]

The procedure in *Collins* v. *Welch* (2) was the same as in the present action.

[BRAMWELL, L.J. The objection to the jurisdiction of the Divisional Court does not appear to have been relied upon.]

At all events no "good cause" was shewn.

LORD SELBORNE, L.C. One point is sufficient to dispose of this case, although other points have been raised during the argument which may call for some very brief notice. It is that the judge not only expressed his opinion as to the order which ought to be made as to costs, but he also gave judgment for 105*l.* without costs; and no authority has been cited which points out that a Divisional Court is enabled to vary or annul that judgment. The application of the plaintiffs ought to have been made to the Court of Appeal in the first instance. This is not the first occasion upon which a similar question, as to the power of the judge at the trial over the costs, has been brought before this Court; it was raised in *Collins* v. *Welch* (2), and an erroneous practice appears to have followed from that decision; but the point as to the jurisdiction of the Divisional Court was not taken. *Myers* v. *Defries* (3) shews that an alternative power is vested in the Divisional Court, and that it has a jurisdiction to disallow the costs. If the judge at the trial has made no order as to the costs, the Divisional Court has power to disallow the costs; but if

(1) 2 Q. B. D. 171.

(2) 5 C. P. D. 27.

(3) 4 Ex. D. 176.

he has made an order under the power vested in him, then the Divisional Court has no jurisdiction. If the order of the judge is wrong in point of law, an application to rectify it must be made to the Court of Appeal. The present application is to alter a final judgment, and not to the alternative jurisdiction of the Divisional Court. This ground is enough to dispose of this appeal; but I feel bound to add that the decision in *Collins* v. *Welch* (1) seems to me correct. In that case the judge only anticipated an application intended to be made by the defendant's counsel to deprive the plaintiff of costs; he exercised the power to disallow the costs, and it was held that his decision was right. It is not now necessary to determine what is the "good cause" which must be shewn; it may be that a power to appeal from the decision of the judge does exist, but at all events the onus probandi lies on the party alleging that the judge has in point of law wrongly exercised his jurisdiction.

BRAMWELL and BAGGALLAY, L.JJ., concurred.

Appeal allowed.

Solicitor for plaintiffs: *H. G. Field, for Etty, Liverpool.*

Solicitors for defendants: *Clarke, Woodcock, & Ryland, for A. Grundy & Sons, Manchester.*

---

(1) 5 C. P. D. 27.

J. E. H.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1881, will be as follows:—

In the First Series,
18 Ch. D.

In the Second Series,
7 Q. B. D. 6 P. D.

In the Third Series,
6 App. Cas.

INDEX.

AGENT—London agent of solicitor—Refusal to pay lay client amount of debt recovered in action - - - - 155
See SOLICITOR AND CLIENT.

ALEHOUSE—Death of license-holder before expiration of license—Fresh license 238
See LICENSING ACTS.

ALTERATION—Bank note—Liability of bank
See BANK OF ENGLAND. [270

APPEAL—Criminal matter—Mandamus - 575
See PARLIAMENT.

—— Local Government Acts—Criminal cause or matters - - - - 534
See PRACTICE. 2.

AVERAGE, GENERAL—Deck cargo - 62
See SHIP.

BAIL—Money paid as indemnity—Illegality 548
See MUNICIPAL CORPORATION.

BANK OF ENGLAND—*Action on Note—Erasure of Number—Material Alteration.*] In an action against the Bank of England for non-payment of notes payable to bearer issued by them, it appeared that the notes had been bonâ fide purchased by the plaintiff for value, but that they had been fraudulently obtained by the person from whom he purchased them, and that before they were in the custody of the plaintiff they had been altered, by erasing the numbers upon them and substituting others, with the object of preventing the notes from being traced:—*Held*, by Lord Coleridge, C.J., that the alteration was not material in the sense of affecting the plaintiff's right of action on the notes, and that the defendants were liable. SUFFELL *v.* THE BANK OF ENGLAND - - - - - 270

BANKRUPTCY—*Landlord and Tenant—Bankruptcy of Lessee after granting Sub-lease—Disclaimer by Lessee's Trustee of Lessee's Interest in Premises—8 & 9 Vict. c. 106, s. 9—Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 125.] When a lessee sublets, and afterwards becomes bankrupt, and his trustee, under s. 23 of the Bankruptcy Act, 1869, and under an order of the Court of Bankruptcy, disclaims the lessee's interest in the premises, the lessor is not entitled to eject the sub-tenant.—Lessee for a term of years by deed demised part of the premises for a shorter term, and the sub-lessee entered into possession. The lessee afterwards liquidated by arrangement, under the Bankruptcy Act, 1869, and his trustee, under an order of the Court of Bankruptcy, disclaimed the lessee's interest in the premises. Notice of the application to the Court for leave to disclaim was given to the sublessee within a reasonable time before the order was made. The lessor having brought an action to recover possession of the part of the premises demised to the sub-lessee as from the date of the appointment of the trustee:—*Held*, reversing the judgment of Mathew, J., that the lessor was not entitled to recover possession.—*Taylor* v. *Gillott* (Law Rep. 20 Eq. 682) commented upon. SMALLEY *v.* HARDINGE - - - **C. A.** 524

2. —— *Trustee—Default in rendering Accounts—Committal for Contempt—Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *s.* 55—*General Rules,* 126, 178, 179.] The mere fact that a trustee in bankruptcy has within four days after his resignation or removal from office neglected to render the accounts prescribed by General Rule 126 of the Bankruptcy Act, 1869, is not sufficient ground for his committal to prison by the Court of Bankruptcy, as for a contempt. To warrant such committal there must be some evidence that he has after notice from the Court wilfully failed to perform the duties imposed upon him by the rule. RE POOKES ROYLE - 9

3. —— *Trustee—Trust Funds misapplied, following Proceeds of—Moneys held in a Fiduciary Character—Advances for Particular Purpose misappropriated—Agent—False Representation—Property, passing of—Reputed Ownership—Trustee in Bankruptcy takes Property subject to same Equities as Bankrupt.*] The defendants were brewers, and employed F. as their "malting agent." The regular course of business between the defendants and F. was as follows:—F. occu-

BANKRUPTCY—*continued.*

pied the malting premises, and took out the necessary licenses. It was his duty to buy barley in his own name as principal for cash, to send in to the defendants certain periodical accounts of the barley so bought from time to time and the prices of the same, to submit samples to the defendants, and if the barley was approved of by them to malt it and deliver the malt to the defendants, receiving a commission upon the quantity of barley steeped. The quantity of malt required by large brewers being very great, the brewer, and not the malting agent, provides the capital for the purchase of the barley. In the present case the defendants kept accounts at certain provincial banks, upon which F. was empowered to draw, and from time to time the defendants paid in lump sums to the credit of those accounts, in accordance with current requirements, as shewn by the accounts sent in by F. of barley purchased, but these sums were not intended to, nor did they, represent any payments for any specific barley. F.'s business was to act as malting agent for the defendants exclusively. The defendants paid the duty as the same became payable upon the malt in F.'s premises. F. had fraudulently departed from the regular course of business. Instead of buying barley for cash and applying the balances at the provincial banks in payment for the same, he had been in the habit of sending in to the defendants fictitious accounts of barley purchased, misapplying the sums paid in for his own purposes, and providing the malt needed for the defendants' purposes by purchasing barley or ready-made malt on credit. He likewise from time to time sold barley which had been brought on to the maltings to raise money for his own purposes. The defendants believed, in consequence of the fictitious accounts and other false representations of F., that barley was from time to time purchased for cash, in accordance with the regular course of business, and on the faith thereof continued to pay sums of money into the banks for the purpose of paying for such barley, which they believed were so applied. F. subsequently absconded, leaving upon his premises barley to the value of about 22,000*l.* and malt to the value of about 35,000*l.*, upon part of which duty had been paid by the defendants. The value of such malt and barley was less than the amount drawn from the banks and misappropriated by F. The defendants seized the barley and malt so left on F.'s premises, and, F. having been adjudicated bankrupt, the trustee in bankruptcy sued the defendants for the value of the same:—*Held*, that the moneys advanced by the defendants to provide for the purchase of the barley were impressed with a trust; that even if the barley and malt left on the premises of F. were not bought in accordance with the authority given to him, and the legal property in the same was not vested in the defendants, but in F., nevertheless F. was a trustee for the defendants, to the extent of the sums advanced by them, of such barley and malt, the same being either the product of trust moneys, or in substitution for the barley, in payment for which F. ought to have applied such trust moneys; that F. could not have set up his own breach of trust or have been heard to allege that the barley and malt was bought otherwise than according to the authority given to him; that the trustee in bankruptcy could not in this respect stand in a better position than F.; that the barley and malt were not in the order and disposition of F. as reputed owner thereof, it being notorious that "malting agents" are not usually the owners of the barley and malt on their maltings; and that consequently the plaintiff could not recover. HARRIS *v.* TRUMAN - - - - 340

BASTARDY—*Order of Maintenance—Marriage of Mother after making of Order—Ability of Husband to maintain bastard Child—Liability of putative Father.*] An order obtained by a single woman for the maintenance of a bastard child can be enforced against the putative father after the marriage of the mother although her husband is able to maintain the child. HARDY *v.* ATHERTON 264

2. —— *Order made since* 35 & 36 *Vict. c.* 65, *for Payment until the Child attains the age of Sixteen or the Mother marries—Discretion of Justices to order Payment for less than Maximum Period.*] The justices have a discretion under 35 & 36 Vict. c. 65, to order weekly payments for the maintenance of a bastard child for a less period than the maximum period given by s. 5 of the Act, and consequently, where the justices made an order for weekly payments until the child attained the age of sixteen or the mother married, such order was held not to be in force after the marriage of the mother. PEARSON *v.* HEYS 260

BEERHOUSE—Forfeiture of licence—Permission for owner to carry on business—Discretion 542
See LICENSING ACTS.

BILL OF EXCHANGE—*Indorser and Indorsee—Reindorsement—Circuity of Action.*] The son of the defendant bought goods of the plaintiffs, and required credit to enable him to pay. It was agreed that the defendant should become surety for the price of the goods. The plaintiffs accordingly drew two bills of exchange and indorsed them to the defendant, who reindorsed them to the plaintiffs. The bills having been dishonoured at maturity:—*Held*, that the plaintiffs were not precluded from suing the defendant on the ground of circuity of action, and that they could recover the amount of the bills from the defendant. WILKINSON & CO. *v.* UNWIN - C. A. 636

—— Forgery - - - - - - 78
See CRIMINAL LAW—FORGERY.

BILL OF SALE—*Attestation by Grantee—Apparent Possession—Bills of Sale Act,* 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8, 10.] The grantee of a bill of sale, although he may be a solicitor, cannot be the attesting witness thereof under the Bills of Sale Act, 1878, s. 10, subs. 1. J. having executed a bill of sale, a man was put in possession of the goods comprised in it by the grantee. The house, in which the goods were, belonged to J., and he had a key of it: he did not sleep in it, but he went in and out as he pleased:—*Held*, that the goods were in the possession or apparent possession of J. within the meaning of the Bills of Sale Act, 1878, ss. 4, 8. SEAL *v.* CLARIDGE - C. A. 516

2. —— *Priority — Registered Bill of Sale—Unregistered Bill of Sale—Bills of Sale Act,* 1878 41 & 42 *Vict. c.* 31), *s.* 10.] A bill of sale attested

BILL OF SALE—*continued.*
and registered under the Bills of Sale Act, 1878, takes priority over one that is earlier but unregistered, as to any chattels which may be comprised in both. *Lyons* v. *Tucker* (6 Q. B. D. 660) dissented from. CONELLY *v.* STEER - **C. A.** 520

3. —— *Registration — Inventory of Goods— Receipt of Sheriff's Officer for Purchase-money of Goods sold under Execution—Bills of Sale Act,* 1878 (41 & 42 *Vict. c.* 31).] The sheriff having seized the goods of the defendant under a writ of fi. fa. issued by C., sold them to the claimant for 65*l.* A deposit of 40*l.* was paid at the time of sale, and 25*l.* on the following day; the sheriff, thereupon, gave to the claimant an inventory of the goods, and a receipt for the price, which were never registered under the Bills of Sale Act, 1878. The defendant remained in possession of the goods, which were afterwards seized by the sheriff under a writ of fi. fa. issued in the present action:—*Held*, that the inventory and receipt did not amount to a "bill of sale" within the meaning of the Bills of Sale Act, 1878; and that the claimant was entitled to the goods as against the plaintiffs. *Woodgate* v. *Godfrey* (5 Ex. D. 24) followed. MARSDEN *v.* MEADOWS - - - - - - 80

4. —— *Bills of Sale Act,* 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10—*Unregistered and Registered Bills of Sale—Priority.*] Chattels were assigned to the defendant by a bill of sale, which was not registered. The grantor subsequently gave another bill of sale comprising the chattels to the plaintiff, who registered it. The defendant afterwards took possession of the chattels under his bill of sale. In an action against him by the plaintiff for conversion:—*Held*, reversing the judgment of the Queen's Bench Division, that the registered bill of sale, took priority over the unregistered bill of sale, and that the plaintiff was entitled to judgment. LYONS *v.* TUCKER - - - **C. A.** 523

5. —— *Bills of Sale Act,* 1878 (41 & 42 *Vict. c.* 31), *s.* 8—*Statement of Consideration—Deduction of Commission on Loan.*] At the execution of a bill of sale expressed to be "in consideration of 700*l.* now in hand paid" a sum of 7*l.* 10*s.* was paid to or retained by the grantee out of the 700*l.* for commission on the loan and expenses in connection therewith in pursuance of a previous arrangement to that effect;—*Held*, affirming the decision of the Queen's Bench Division, that the consideration was not truly stated as required by s. 8 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), and that the bill of sale was void. HAMILTON *v.* CHAINE [**C. A.** 319

BOROUGH—No commission of peace—Jurisdiction of mayor - - - - - 548
See MUNICIPAL CORPORATION.

BRIDGE—Freedom from toll—Liability to poor rate - - - - - - 223
See POOR RATE.

BY-LAW—Validity and construction of - 32
See RAILWAY COMPANY.

CASES—*Hoare* v. *Rennie*, 5 H. & N. 19, considered
See CONTRACT. 3. [92

CASES—*continued.*
—— *Hobbs* v. *London & South Western Railway Company*, Law Rep. 10 Q. B. 111, commented upon - - - 591
See DAMAGES. 2.

—— *Johnson* v. *Chapman*, 19 C. B. (N.S.) 563; 35 L. J. (C. P.), 23 commented upon, 62
See SHIP.

—— *Lyons* v. *Tucker*, 6 Q. B. D. 660, dissented from - - - - - 238
See BILL OF SALE. 2.

—— *Mellor* v. *Denham* (5 Q. B. D. 467) followed,
See PRACTICE. 2. [534

—— *Murphy, In re*, 2 Q. B. D. 397), discussed, 388
See ELEMENTARY EDUCATION.

—— *Reg.* v. *Price* (Law Rep. 6 Q. B. 411) overruled,
See PARLIAMENT. [575

—— *Richardson* v. *Saunders* (6 Q. B. D. 313) overruled, - - - - 388
See ELEMENTARY EDUCATION.

—— *Simpkin* v. *Justices of Birmingham* (Law Rep. 7 Q. B. 482) followed, - - 238
See LICENSING ACTS.

—— *Taylor* v. *Gillott* (Law Rep. 20 Eq. 682) commented upon, - - - 524
See BANKRUPTCY.

—— *Woodgate* v. *Godfrey* (5 Ex. D. 24) followed,
See BILL OF SALE. 3. [80

CHARTERPARTY — Option of cancelling — Insurance (marine)—Concealment 73
See INSURANCE (MARINE).

COMMITTAL—County Court—Power to enforce interlocutory order - - - 623
See COUNTY COURT.

CONFESSION—Admissibility of—Evidence 147
See EVIDENCE.

CONTEMPT — Bankruptcy—Trustee—Default in rendering accounts - - 9
See BANKRUPTCY. 2.

CONTRACT—*Implied Undertaking as to the Condition of a specific Article—State of Repair and fitness for Use.*] The plaintiff, a master mariner, contracted with the defendants for a lump sum to be paid him by the defendants to take a certain specified steam-tug of the defendants, towing six sailing barges, from Hull to the Brazils, the plaintiff paying the crew and providing provisions for all on board for seventy days. The engines of the steam-tug were damaged and out of repair at the time of the contract, but neither the plaintiff nor defendants were then aware of this. The consequence however of the engines being so defective was that the time occupied in the voyage was increased, and the plaintiff's gain in performing his contract was much less than it would otherwise have been:—*Held*, by Brett and Cotton, L.JJ., that as the contract related to a specified vessel, there was no implied undertaking by the defendants that it should be reasonably efficient for the purposes of the voyage, and that therefore the defective state of the engines gave the plaintiff no cause of action, it not appearing that the engines were in a worse state when the plaintiff took possession of the vessel than they were at the time of the contract.—*Held*, contra, by Bramwell, L.J., that the defective state of the

CONTRACT—*continued.*

engines gave the plaintiff a cause of action, as there was an implied undertaking by the defendants that the engines were not so defective. Robertson *v.* Amazon Tug and Lighterage Company - - - - - **C. A. 598**

2. —— *Representation influencing Conduct—Interest in Land—Verbal Promise to devise such Interest—Part Performance—Statute of Frauds, s. 4.*] The plaintiff as heir-at-law of an intestate claimed the title deeds of the intestate's farm of which the defendant had taken possession on his death. The defendant counterclaimed a declaration that she was entitled to a life estate in the farm, and to retain the title deeds for her life. The jury found that the defendant was induced to serve the intestate as his housekeeper without wages for many years, and to give up other prospects of establishment in life by his promise, which was a verbal one, to make a will leaving her a life estate in his farm, if and when it became his property:—*Held*, reversing the judgment of Stephen, J., that neither the continuance of the defendant in the service of the intestate, nor the fact that the latter had executed a document which he intended to operate as a will in the defendant's favour, but which failed to take effect from want of proper attestation, was any evidence of a sufficient part performance of the parol agreement between the intestate and the defendant, upon which the defendant's counterclaim was based, to exclude the operation of the Statute of Frauds, and therefore that the 4th section of that statute was an answer to the counterclaim. Alderson *v.* Maddison **C. A. 174**

3. —— *Sale of Goods to be delivered by Instalments—Failure as to one Instalment—Right to cancel Contract.*] The defendant in October, 1879, sold to the plaintiff, and the plaintiff bought of the defendant, 2000 tons of pig iron at 42*s.* a ton, to be delivered to the plaintiff free on board at maker's wharf, at Middlesborough, "in November, 1879, or equally over November, December, and January next, at 6*d.* per ton extra." The plaintiff failed to take delivery of any of the iron in November, but claimed to have delivery of one-third of the iron in December and one-third in January. The defendant refused to deliver these two-thirds, and gave notice that he considered that the contract was cancelled by the plaintiff's breach to take any iron in November:—*Held*, in an action by the plaintiff for damages, in respect of the defendant's refusal (Brett, L.J., dissenting), that by the plaintiff's failure to take one-third of the iron in November, the defendant was justified in refusing to deliver the other two-third afterwards.—The decision in *Hoare* v. *Rennie* (5 H. & N. 19) held to be right by Bramwell and Baggallay, L.JJ., and wrong by Brett, L.J. Honck *v.* Muller - **C. A. 92**

CORONER—Justice of the peace—Disqualification - - - - - - 513
See Justice of the Peace.

CORPORATION—Contract not under seal - 529
See Local Government Acts.

COSTS—Taxation—Plaintiff succeeding upon one of several claims - - - 362
See Practice. 5.

COUNTER-CLAIM—Pleading - - 626
See Practice. 9.

COUNTY COURT—*Jurisdiction to enforce Interlocutory Order by committal—Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 89, *Order XLII., r.* 5.] The power of a county court under the Judicature Act, 1873, s. 89, in action within the jurisdiction to enforce obedience to its orders by committal, extends to interlocutory as well as to final orders. Richards *v.* Cullerne - - **C. A. 623**

2. —— *Interpleader—Practice—Deposit—Request—Sale by High Bailiff*—19 *&* 20 *Vict. c.* 108, *s.* 72—30 *&* 31 *Vict. c.* 142, *s.* 31—*County Court Order XXI., rule* 1.] Under Order XXI., rule 1, of the County Courts Orders and Rules, 1875, it is not necessary for the high bailiff, before selling goods seized in execution and claimed, to request the claimant to deposit the amount of the value of the goods or possession money, and, if no such deposit be made, the high bailiff is entitled under 19 & 20 Vict. c. 108 (the County Courts Acts, 1856), s. 72 to sell the goods without first applying for an interpleader summons under 30 & 31 Vict. c. 142 (the County Courts Act, 1867), s. 31. Davies *v.* Wise; Cramer & Co.; Cramer *v.* Matthew - - - - 425

—— Judgment of nonsuit — Bar to action in Superior Court - - - 329
See Practice. 8.

COUNTY COURT ORDERS—Order XVI., r. 17.
See Practice. [329

—— Order XXI., r. 1. - - - 425
See County Court. 2.

CRIMINAL LAW — *Forgery — Inchoate Negotiable Instrument—Bill of Exchange.*] H. purchased goods upon the terms that he should give to the vendors his acceptance for the price, indorsed by a solvent third party. The vendors sent to him for such acceptance and indorsement a document in the form of a bill of exchange, for the price, but without any drawer's name thereon. H. returned this document accepted by himself, and with what purported to be an indorsement by a solvent third party. This indorsement was fictitious and had been forged by H. No drawer's name was ever placed upon the document:—*Held*, by the Court (Lord Coleridge, C.J., Grove, Hawkins, Lopes, and Stephen, JJ.), that the document was not a bill of exchange, as it bore no drawer's name, and that H. could not be convicted of feloniously forging or feloniously uttering an indorsement on a bill of exchange.—*Semble*, that he might have been convicted of a common law forgery. Reg. *v.* Harper - - - **C. C. R. 78**

2. —— *India—Inquiry as to Sanity of Accused—Removal to England—Detention in Asylum—*14 *&* 15 *Vict. c.* 81, *s.* 1.] By 14 & 15 Vict. c. 81, s. 1, if any person shall be indicted for or charged with any crime or offence in any court in India, and shall be acquitted of or not be tried for such crime or offence on the ground of his being found to be of unsound mind, he may be removed to England in the manner prescribed by the Act.—A European British subject in India having been arrested for homicide, a district magistrate was informed of it, and went with witnesses to a private house in the presidency, where the accused was detained. On seeing him and receiving medical

CRIMINAL LAW—*continued.*
testimony on oath as to his state of mind, the magistrate deemed him insane and unfit to be tried, and so reported to the Government of the Presidency. The Government made an order under 14 & 15 Vict. c. 81, s. 1, for the removal of the prisoner to England. By virtue of the order he was brought in custody to England, and on his arrival a Royal warrant was issued, under s. 2, for his reception into a lunatic asylum, where he was accordingly kept:—*Held*, that the prisoner was charged with a crime in a "court," and "not tried" on the ground of being "found" to be of unsound mind within the meaning of s. 1, and that his detention was lawful. IN RE MALTBY 18

3. —— *Murder, endeavouring to persuade, or encouraging to commit—Foreign Sovereign, Newspaper Article inciting to Murder of—24 & 25 Vict. c.* 100, *s.* 4.] M. was indicted under 24 & 25 Vict. c. 100, s. 4. The encouragement and endeavour to persuade to murder, proved at the trial, was the publication and circulation by him of an article, written in German in a newspaper published in that language in London, exulting in the recent murder of the Emperor of Russia, and commending it as an example to revolutionists throughout the world. The jury were directed that if they thought that by the publication of the article M. did intend to, and did, encourage or endeavour to persuade any person to murder any other person, whether a subject of her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find him guilty:—*Held*, by the Court (Lord Coleridge, C.J., Grove, and Denman, JJ., Huddleston, B., and Watkin Williams, J.), that such direction was correct, and that the publication and circulation of a newspaper article might be an encouragement, or endeavour to persuade to murder, within s. 4 of 24 & 25 Vict. c. 100, although not addressed to any person in particular. THE QUEEN *v.* MOST [C. C. R. 244

4. —— *Practice—Indictment for Obstruction of Highway—Acquittal—New Trial.*] Upon the trial of an indictment for obstructing a highway the defendant was acquitted:—*Held*, that a new trial on the ground of misreception of evidence, misdirection, and that the verdict was against evidence, could not be granted. REG. *v.* DUNCAN [198

CUSTOM—Right of miner to remove buildings
See MINE. [295

—— Implied contract between manufacturer of iron plates and customer - - 438
See SALE OF GOODS.

DAMAGES—*Warehouseman—Breach of Contract —Remoteness—Negligence.*] The defendant contracted to warehouse certain goods for the plaintiff at a particular place, but he warehoused a part of them at another place where, without any negligence on his part, they were destroyed. In an action to recover as damages the value of the goods:—*Held* (by Grove, Lindley, and Stephen, JJ.), that the damage was not too remote, and that the defendant, by his breach of contract, had rendered himself liable for the loss of the goods. LILLEY *v.* DOUBLEDAY - - - 510

2. —— *Remoteness—Contract.*] The defendant, an innkeeper, contracted with the plaintiff, a horsedealer, to provide him with stabling for a number of horses during a fair at which they were to be sold, but in consequence of the defendant, in breach of such contract, having let his stables to another person, the plaintiff's horses, after they had been put into the defendant's stables on their arrival there, from a railway journey, were turned out by that person, assisted by the defendant's servant, without their clothing, and they remained in the defendant's yard exposed to the weather for some time until the plaintiff could find suitable stables for them elsewhere. Owing to this exposure several of them caught cold, which depreciated their value in the market:—*Held*, that the damage in respect of such cold was recoverable, as it was the probable consequence of the defendant's breach of contract, and was not therefore too remote.—*Hobbs* v. *London and South Western Ry. Co.* (Law Rep. 10 Q. B. 111) commented on. MCMAHON *v.* FIELD [C. A. 591

DEBENTURE—Stamp duty - - - 165
See STAMP.

DEFAMATION — *Privileged Communication — Charity Organisation Society.*] A. interested herself in obtaining subscriptions for the relief of the plaintiff, a lady in distressed circumstances. B., who was interested in the case, applied to the defendant, the Secretary of the Charity Organisation Society, for information as to the plaintiff's character, and received an unfavourable report which, by leave of the secretary, she communicated to A. The subscriptions were thereupon withdrawn. The plaintiff then sued the secretary for libel. The society was formed for the purpose (inter alia) of investigating the cases of applicants for charitable relief:—*Held*, that the report was a privileged communication, and that, in the absence of proof of malice, the action could not be maintained. WALLER *v.* LOCH - C. A. 619

—— Slander uttered abroad—Service out of jurisdiction - - - - 434
See PRACTICE. 10.

DISCOVERY—Action brought in name of third parties - - - - 553
See PRACTICE. 7.

—— Affidavit of documents—How far conclusive - - - - - 400
See PRACTICE. 6.

DISTRESS WARRANT—Justices—Power to delay execution - - - - 398
See POOR RATE.

ECCLESIASTICAL LAW — *Public Worship Act,* 1874 (37 & 38 *Vict. c.* 85), *s.* 9—5 *Eliz. c.* 23, *s.* 11 —53 *Geo.* 3, *c.* 127, *s.* 1—2 & 3 *Wm.* 4, *c.* 93, *s.* 1 —*Judge of Provincial Chancery of York—Request to hear Matter at Westminster—Power to sit out of his Province — Writ de contumace capiendo — County Palatine of Lancaster.*] A representation

ECCLESIASTICAL LAW—*continued.*
having been made against a clergyman, rector of a parish within the County Palatine of Lancaster, in the province of York, under the Public Worship Act, 1874, for breaches of ecclesiastical law, the bishop sent the matter to the archbishop, who sent it to the judge of the Provincial Courts of Canterbury and York, requiring him to hear it at London or Westminster, or within the province of York, or diocese of M. The judge elected to hear it at Westminster, and accordingly having there heard the case, issued a monition warning the defendant to abstain from the practices complained of. The defendant still continuing the practices, the judge, still sitting in the same place, issued an inhibition inhibiting him from performing divine service, and on his persisting in his disobedience pronounced him in contempt, and signified the contempt to the Chancery Division of the High Court, and sent a copy of the significavit by mittimus to the Chancery Court of the County Palatine of Lancaster. The Vice-Chancellor of the County Palatine sitting at Lincoln's Inn, having heard the matter argued before him, ordered the writ de contumace capiendo to issue, and it was accordingly issued out of the office of the Court of the County Palatine at Preston, and the defendant was arrested:—*Held*, that the arrest was lawful, for first, the judge of the Provincial Court of York had jurisdiction while sitting at Westminster, not only to hear the representation and issue his monition, but to hear and adjudicate on all other matters incident to the case, and therefore the order to issue the writ of significavit was regular.—Secondly, the proceedings by which the writ de contumace capiendo was issued out of the Chancery Court of the County Palatine were in accordance with the Act 53 Geo. 3, c. 127, and the Act 5 Eliz. c. 23, and were regular.—Thirdly, there was no irregularity in the Vice-Chancellor of the County Palatine ordering the issue of the writ de contumace capiendo while sitting in Lincoln's Inn, as he was not acting in a judicial capacity. Ex parte Green - - - - C. A. 273

ELECTION—Nomination paper—Alteration—Town councillor - - - 369
See Municipal Corporation. 2.

ELECTION PETITION—Taxation of costs—Certificate of registrar—How far conclusive [477
See Parliament—Election Petition.

ELEMENTARY EDUCATION—*Attendance Order—Child attending Board School without Fees—Liability of Parent*—33 & 34 *Vict. c.* 75, *s.* 17; 39 & 40 *Vict. c.* 79. *ss.* 10, 11, 12; 43 & 44 *Vict. c.* 23, *s.* 4.] A parent who, under an order by a court of summary jurisdiction that his child shall attend a board school, and that he do see that the order is complied with, causes the child to attend school, but without the school fees, and without having applied to the guardians under 33 & 34 Vict. c. 75, for payment of such fees, or to the school board under s. 17 for a remission of them, is liable to be convicted under the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 10, for non-compliance with the order.—*Richardson* v. *Saunders* (6 Q. B. D. 313) overruled.—*In re Murphy* (2 Q. B. D. 397) discussed. Saunders v. Richardson - - - - - 388

2. —— *Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79), *s.* 11—*Neglect to Educate a Child—Parent—Liability where Child in the actual Custody of some other Person.*] The respondent was summoned for non-compliance with an Order under s. 11 of the Elementary Education Act, 1876, to educate a child of which she was the parent. The child was not residing with the respondent, but with a relative, and the magistrate on that ground refused to convict:—*Held* (by Coleridge, C.J., Pollock, B., and Manisty, J.), that s. 3 of 33 & 34 Vict. c. 73, which declares that the term parent shall include "guardian and every person who is liable to maintain, or has the actual custody of any child," does not affect the primary liability of the parent, if there be one, and that the respondent ought to have been convicted. School Board for London *v.* Jackson - - - - - 502

EVIDENCE—*Confession—Admissibility of.*] On a trial for larceny, evidence was received of a confession made by the prisoner to the prosecutor in the presence of a police inspector, immediately after the prosecutor had said to the prisoner, "The inspector tells me you are making house-breaking implements; if that is so, you had better tell the truth, it may be better for you":—*Held*, by the Court (Lord Coleridge, C.J., Grove, Hawkins, Lopes, and Stephen, JJ.), that the confession was not admissible in evidence. Reg. *v.* Fennell - - - - C. A. 147

FISHERY—*Oysters—Navigable River—Corporation—Crown Grant—Several Fishery—Prescription—Claim of Inhabitants to Dredge—Immemorial Usage.*] The plaintiffs, the mayor and free burgesses of a borough, were incorporated by Royal charters, and claimed to be entitled to a several oyster fishery in a tidal navigable river. The defendants, who were sued for trespasses to this fishery, were the free inhabitants of ancient tenements in the borough. The free inhabitants of ancient tenements in the borough had from time immemorial, without interruption and claiming as of right, exercised the privilege of dredging for oysters in the river from the 2nd of February in each year to Easter Eve in each year, and of catching and carrying away the same without stint for sale or otherwise. The acts complained of were done in the exercise of this privilege. The plaintiffs produced no actual grant from the Crown of a several oyster fishery, but they proved a user (by evidence inter alia of leases by the corporation since 1680, of the exclusive right to dredge during the whole year, and of receipt of money by the corporation for oysterage), from which user, but for the privilege so exercised by the free inhabitants of the borough, a grant from the Crown of such several fishery ought to be inferred to have been made to the predecessors of the plaintiffs as early as Henry II.:—*Held* (Baggallay, L.J., dissenting), that the privilege exercised by the free inhabitants did not prevent the inference of there having been such a grant to the predecessors of the plaintiffs:—*Held* (by Brett and Cotton, L.JJ.), that

FISHERY—*continued.*
considering the user proved by the plaintiffs no inference should be drawn, from the exercise of such privilege by the free inhabitants, that in the grant of the several fishery to the plaintiffs there was either an exception of this period during which the said privilege of the free inhabitants had been exercised, or a trust declared for such inhabitants during that period. The Mayor of Saltash *v.* Goodman - - - C. A. 106

FOREIGN SOVEREIGN—Incitement to murder
See Criminal Law. [244

FORGERY—Bill of exchange—Inchoate instrument - - - - 78
See Criminal Law—Forgery.

FRAUDS, STATUTE OF—*s.* 4—*Memorandum in Writing — Reference to Document containing Terms of Agreement.*] The plaintiff had signed a memorandum setting forth the terms of a contract by which the plaintiff agreed to let a carriage to the defendant for the period of a year. The defendant in a subsequent letter to the plaintiff signed by him referred to "our arrangement for the hire of your carriage."—There was no other arrangement for the hire of a carriage than that the terms of which were contained in the memorandum signed by the plaintiff:—*Held*, that the defendant's letter sufficiently referred to the document containing the terms of the contract, to constitute a good memorandum of the contract within the Statute of Frauds, s. 4. Cave *v.* Hastings - - - - - 125
—— Representative influencing conduct - 174
See Contract. 2.

FREIGHT—Chartered freight—Interest - 73
See Insurance (Marine).

HIGHWAY—*Repair—Gathering Stones upon inclosed Land — Right to Compensation—5 & 6 Wm. 4, c. 50, s. 51.*] Under the Highway Act, 5 & 6 Wm. 4, c. 50, s. 51, justices are entitled to grant the surveyor of highways a licence to gather stones upon inclosed land within the parish for the repair of its highways, without making any compensation to the owner for the value of such stones. The Alresford Rural Sanitary Authority *v.* Scott - - - - - 210

2. —— *Locomotive—Tricycle—Locomotives Act, 1861 (24 & 25 Vict. c. 70), ss. 8, 12—Locomotives Act, 1865 (28 & 29 Vict. c. 83), ss. 3, 4, 7—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), ss. 28, 29, 38.*] A tricycle was capable of being propelled by the feet of the rider, or by steam as an auxiliary, or by steam alone. There was no smoke, nor escape of steam into the air, nor anything to indicate that it was being worked by steam, nor anything which could frighten horses, or cause danger to the public using the highway beyond any ordinary tricycle. The weight was abont two hundredweight, and the tires of the wheels about one and a half inches in width. The tires being of indiarubber no injury would be done to the surface of the road by working the machine on it:—*Held*, by Lord Coleridge, C.J., Pollock, B., and Manisty, J., that the tricycle was a "locomotive" within the definition in s. 38 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), and was therefore subject to the rules and regulations for the use of locomotives on highways prescribed by ss. 28 and 29 of that Act, by the Locomotives Act, 1861 (24 & 25 Vict. c. 70), s. 12, and the Locomotives Act, 1865 (28 & 29 Vict. c. 83), ss. 3, 4, 7. Parkyns *v.* Preist - 313
—— Indictment for obstruction of—New trial 198
See Criminal Law.

HOUSE DUTY—Structural severance—Occupation by landlord - - - 136
See Revenue. 2.

HUNDRED—Action against—Damage to houses
See Riot. [201

HUSBAND AND WIFE — Poor law — Maintenance—Adultery of wife - - 89
See Poor Law.

ILLEGALITY—Agreement to indemnify bail 548
See Municipal Corporation.

INCOME TAX — Coal mines — Diminution of profits - - - - 485
See Revenue. 3.
—— Foreign corporation—Dividends to shareholders - - - - 562
See Revenue.
—— Foreign telegraph company — Exercising trade in England - - - 12
See Revenue. 4.

INDIA—Criminal law—Inquiry as to sanity of accused—Removal to England - 118
See Criminal Law. 2.

INDICTMENT—Obstruction of highway — New trial - - - - - 198
See Criminal Law. 4.

INSURANCE (LIFE)—*Insurance against Accident —"Sole Cause of Death"—Sudden Fit—Fall from Platform upon Railway—Construction of Policy.*] A policy of insurance against death from accidental injury contained the following condition: "This policy insures payment only in case of injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, but it does not insure in case of death arising from fits . . . . or any disease whatsoever arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury." — The insured, while at a railway station, was seized with a fit and fell forwards off the platform across the railway, when an engine and carriages which were passing went over his body and killed him:—*Held*, that the death of the insured was caused by an accident within the meaning of the policy. and that the insurers were liable. Lawrence *v.* The Accidental Insurance Company (Limited) [216

INSURANCE (MARINE) — *Chartered Freight—Interest—Commencement of—Risks "incident to Steam Navigation"—Option of cancelling Charterparty—Concealment.*] The plaintiffs, on the 29th

INSURANCE (MARINE)—*continued.*

of July, 1875, chartered their ship *G.* for a voyage from New York to Odessa. The freight was agreed "during the voyage aforesaid" at 5500*l.* in cash at Hull, England, on the discharge of the cargo in Odessa. "If the vessel has not arrived at the port of New York on or before the 1st of September, 1875, charterers have option of cancelling this charterparty." The plaintiffs, on the 7th of August, 1875, effected an insurance with the defendant "at and from London to New York while there, and thence to Odessa, viâ Constantinople," on their chartered freight, including, besides the ordinary ones, all risks "incident to steam navigation." The clause in the charterparty giving the option to cancel was not mentioned to the defendant.—The ship started from England on the 7th of August, but owing to the failure of her machinery in the British Channel was obliged to put back for repairs, which occupied so much time that she did not reach New York until after the 1st of September, whereupon the charterers cancelled the charter and the freight was lost:—*Held* (by Lord Coleridge, C.J.), that the interest in the chartered freight had commenced at the time when the charter was cancelled, but that the defendant was not liable, for the freight was not lost by any of the perils insured against, but by the exercise of the option to cancel in the charterparty; and, further, that the withholding from the defendant information as to the power to cancel vitiated the policy. Mercantile Steamship Company *v.* Tyser - - - 73

2. —— *Re-insurance—Policy attaching—Voyage ended when Policy effected—Risk—Action for Premium.*] The defendant, who had insured a cargo by a certain vessel lost or not lost for a certain voyage, believing such vessel to be overdue, effected a policy of re-insurance with the plaintiff on the same cargo and risk.—Before effecting the policy of re-insurance, the vessel and cargo had in fact arrived safely at the port of destination; but this was not known to either the plaintiff or defendant at the time the policy was effected:—*Held*, that the policy had attached, and that therefore the plaintiff was entitled to the premium at which it had been effected. Bradford *v.* Symondson - - - - - - 456

INTERPLEADER—Deposit—Sale by high bailiff
See County Court. 2. [425

JUSTICE OF THE PEACE—*Disqualification—Coroner.*] A justice of the peace does not become disqualified from acting as such, by reason of his being elected coroner for the county or division for which he so acts as justice. Davis *v.* Justices of Pembrokeshire - - - - 513

LANDLORD AND TENANT—Bankruptcy of lessee after granting sub-lease - 524
See Bankruptcy.

LIBEL—Privileged communication - 619
See Defamation.

LICENSING ACTS—*Alehouse—Licence for Sale of Exciseable Liquors—Death of Licence-holder before Expiration of Licence—Expiration of Licence—Application to Special Sessions—9 Geo. 4, c. 61, ss. 4, 13, 14.*] K., licensed to sell intoxicating liquors under 9 Geo. 4, c. 61, died on the 27th of September. At the general annual licensing meeting on the 2nd of October application was made by the lessees of the house for a fresh licence, without giving the requisite notices under 35 & 36 Vict. c. 94, as there was no time to give them. This application was rejected on the ground that they were not in occupation of or about to occupy the premises. K.'s licence expired on the 10th of October. On the 13th of November W., as assignee of the heir of K., gave notice that he would apply at the special sessions on the 4th of December for a new licence in respect of the house under 9 Geo. 4, c. 61, s. 14:—*Held*, following *Simpkin* v. *Justices of Birmingham* (Law Rep. 7 Q. B. 482), that the justices had no jurisdiction to entertain the application, as it was made after the expiration of the period for which the previous licence remained in force. White *v.* Justices of Coquetdale - - - 238

2. —— *Beerhouse — Licence — Authority to Owner of Premises to continue the Business, where the Occupier's Licence has been forfeited under s. 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49)—Discretion of Justices.*] Where the occupier of a beerhouse has forfeited his licence by being guilty of an offence under s. 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), the grant by the petty sessions of an authority to the owner to carry on the business until the next special sessions for licensing purposes, is in the discretion of the justices, under ss. 1, 4, and 14 of the Licensing Act, 1828 (9 Geo. 4, c. 61); and the person applying for such authority is not entitled to notice under s. 42 of the Act of 1872 (35 & 36 Vict. c. 94) of the objections intended to be urged against his application. The Queen *v.* Moore [542

LIMITATIONS — Action for penalty — Selling silver with counterfeit mark - 465
See Penalty.

LOCAL GOVERNMENT ACTS — *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 174, 200—*Urban Authority — Contract exceeding* 50*l.* *in Value or Amount not under Seal—Corporation.*] Sect. 174 of the Public Health Act, 1875, which directs a contract, made by an urban authority to be under their common seal, if "the value or amount exceeds 50*l.*," applies only to a contract to which the parties at the time of entering into it contemplate that it shall exceed that sum. Scarlet fever having broken out, an urban sanitary authority appointed a committee under s. 200 of the Public Health Act, 1875. A medical man agreed verbally with the committee, on behalf of the urban sanitary authority, to attend the patients at the rate of 5*s.* 3*d.* per tent per day, and attended until the amount due was nearly 100*l.*:—*Held*, affirming the judgment of Stephen, J., that the committee men were not liable to pay the medical man; but—*Held*, reversing the judgment of Stephen, J., that although more than 50*l.* became due, it was not a contract "whereof the value or amount exceeds 50*l.*" within the meaning of the Public Health Act, 1875, s. 174, because at the time of entering into it the parties had not ascertained that it would exceed 50*l.*, and that the urban sanitary authority were liable to the medical man. Eaton *v.* Basker - 529

LOCAL GOVERNMENT ACTS—*continued.*

2. —— *Public Health Act,* 1875—*Local Board, Member of—Contract with the Board—Liability to Penalty for acting as Member when disabled.*] By rule 64 of schedule 2 to Public Health Act, 1875 (38 & 39 Vict. c. 55), it is declared that any member of a local board who "in any manner is concerned in any bargain or contract entered into by such board" shall "cease to be such member, and his office as such shall thereupon become vacant;" and rule 70 imposes a penalty of 50*l.* on "any person who, not being duly qualified to act as member of the local board," "or being disabled from acting by any provisions of this Act, acts as such member":—*Held,* by Brett and Cotton, L.JJ. (Bramwell, L.J., dissenting), that a member of such board, who having been concerned in a contract by the board has thereupon ceased to be such member by force of rule 64, is a person disabled from acting as a member by a provision of the Act within the meaning of rule 70, and consequently that if afterwards he does so act he is liable to the penalty of 50*l.* Fletcher *v.* Hudson - - - - - 611

—— Appeal to Court of Appeal—Criminal cause or matter - - - - 534
See Practice. 2.

LOCOMOTIVE—Tricycle propelled by steam 313
See Highway. 2.

MANDAMUS—Corrupt Practices Act—Commissioners—Criminal matter—Appeal 575
See Parliament.

MAYOR—Borough without commission of peace —Jurisdiction - - - 548
See Municipal Corporation.

METROPOLIS MANAGEMENT ACTS — *Negligence—Liability of Metropolitan Board of Works for Damage caused by letting off Accumulation of Water from a Sewer—Metropolis Local Management Act,* 1855 (18 & 19 *Vict. c.* 120), *ss.* 135, 136—*Act of God.*] The defendants, under the powers conferred upon them by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), ss. 135, 136, constructed, and properly constructed, a sewer having its outfall at Deptford Creek, a little above the plaintiff's coal wharf, with water-gates which it was the duty of the person in charge of them to open when the water within them became eight feet deep,—a depth which was reached only in heavy rainfalls. On the 29th of August, 1879, there was an exceptionally heavy rainfall, and it became necessary to open the water-gates to prevent a large district from being flooded. This having been done, and the rain increasing in violence, the rush of water from the sewer carried away a portion of the plaintiff's wharf, with a barge moored thereto and a quantity of coals deposited therein and thereon:—*Held,* that the injury complained of was occasioned by the opening of the water-gates, and not by the act of God, and therefore the defendants were primâ facie liable for the damage done, within the principle of *Fletcher* v. *Rylands* (3 H. L. C. 330): but that, as they were a public body acting in the discharge of a public duty, and as that which happened was only the inevitable result of what Parliament had authorized them to do, they were not liable. Dixon *v.* Metropolitan Board of Works - - 418

METROPOLIS MANAGEMENT ACTS—*continued.*

MINE—*High Peak Mining Customs and Mineral Courts Acts,* 1851 (14 & 15 *Vict. c.* 94)—*Fixtures—Right of Miner to remove Buildings erected for Mining Purposes.*] Under the mining customs set out in the schedule to, and confirmed by, the High Peak Mining Customs and Mineral Courts Act, 1851, all persons are entitled to search for veins of lead ore "under all manner of lands" situate within the limits of the Act, "of whose inheritance soever they may be," and the "first finder" of any such vein is entitled to have allotted to him by a certain mining official, called the "barmaster," a certain proportion of such vein. Upon allotment, the allottee becomes entitled to the exclusive right of working so much of the vein as is allotted, so long as he continues to work it; and further (by the 5th of the Scheduled Mining Customs) he is, so long as he works such mine, entitled, without making any payment for the same, to the exclusive use of so much of the surface land as is necessary for the proper working of the mine. If the miner ceases to work his mine, the barmaster may (under the 19th of the above-mentioned customs) give him notice that his mine will be forfeited, unless within a certain specified time the working be resumed, and in the event of non-compliance with the notice, the barmaster may give the mine to any other person who is willing to work it:—*Held,* that a miner, who in exercise of his rights under custom 5, has erected upon the land of the surface owner buildings reasonably necessary for the working of his mine, is entitled as against such surface owner to pull down and remove the materials of such buildings at any time whilst he continues to work the mine, or within a reasonable time after he has ceased to do so, and before he has done any act shewing an intention to abandon the mine other than the act of pulling down such buildings, notwithstanding that such buildings may be built of brick or stone, with foundations sunk into the soil; but that he is not entitled to remove them after he has allowed such reasonable time to expire or has otherwise indicated an intention to abandon the mine, although he may have received no notice of forfeiture from the barmaster under custom 19. Wake *v.* Hall - - - C. A. 295

MUNICIPAL CORPORATION—*Municipal Corporations Act* (5 & 6 *Wm* 4, *c.* 76), *s.* 57—*Borough without Commission of Peace—Mayor a Justice of the Peace for Borough—Recognizance by Bail for Appearance of Accused—Money paid by Accused to Bail as Indemnity—Contract contrary to Public Policy.*] The mayor of a borough, without a commission of the peace, before whom a person was brought charged with embezzlement, remanded the accused to the next meeting of the justices of the peace for the county in which the borough was situated, and admitted him to bail, taking the recognizance of the defendant in 100*l.* for the appearance of the accused. The accused paid to the defendant 100*l.* to indemnify him against liability under the recognizances. The accused did not appear before the county justices, who,

MUNICIPAL CORPORATION—*continued.*
not recognizing the authority of the mayor to remand prisoners for appearance before the County bench, took no steps on the information preferred before him, but proceeded on a fresh information, and issued a warrant against the accused which was not executed. It did not appear that the defendant's recognizance had been either forfeited or discharged or that he had paid anything under it. The accused having been adjudicated bankrupt, the plaintiff, as trustee, sued to recover the 100*l.* from the defendant:—*Held* (by Stephen, J.), that, by s. 57 of the Municipal Corporations Act, the mayor was a justice of the peace for the borough, and the recognizance was valid; that the 100*l.* was paid to the defendant in pursuance of a contract which was contrary to public policy, but that the contract had not been executed, and therefore the plaintiff was entitled to recover. Wilson *v.* Strugnell - - - - 548

2. —— *Election of Town Councillor—Nomination Paper—Substitution of different Proposer without privity of assenting Burgesses—Municipal Elections Act*, 1875 (38 & 39 *Vict. c.* 40), *s.* 1, *subs.* 2.] By the Muncipal Elections Act, 1875 (38 & 39 Vict. c. 40), s. 1. subs. 2, at any municipal election (of councillors) every candidate shall be nominated in writing; the writing shall be subscribed by two enrolled burgesses of such borough or ward as proposer and seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination.—At an election of a ward councillor a burgess was nominated in a paper signed by B. and H. as proposer and seconder, and by eight other burgesses as assenting to the nomination. After the nomination paper had been delivered to the town clerk it was altered in the absence of the seconder and assenting burgesses by striking out the name of B. as proposer and substituting that of G., another duly enrolled burgess:—*Held*, that the nomination was invalid. Harmon *v.* Park - - 369

NEGLIGENCE—Liability to fence against adjoining lands - - - - 322
See Railway Company.

—— Sewer—Accumulation of water—Liability of Metropolitan Board of Works - 418
See Metropolis Local Management Acts.

—— Warehouseman—Damages - - 510
See Damages.

NEW TRIAL—Indictment for obstruction of highway - - - - - 198
See Criminal Law. 4.

NONSUIT—Effect of judgment—County Court—Power to make rules - - 329
See Practice. 8.

NOVELTY—Combination of existing inventions
See Patent. [305

OATH—Parliament—Claim to affirm - 38
See Parliament. 3.

PARLIAMENT—*Election Petition—Corrupt Practices Prevention Act* (26 & 27 *Vict. c.* 29), *s.* 7—*Certificate to Witness—Mandamus—Jurisdiction to hear Appeal—Supreme Court of Judicature Act*, 1873, *s.* 47—*Criminal Matter.*] Where the Commissioners appointed to inquire into corrupt practices at a parliamentary election have, with reference to a witness before them on such inquiry, exercised their judgment as to the right of such witness to receive their certificate under s. 7 of the Corrupt Practices Prevention Act (26 & 27 Vict. c. 29), their decision refusing such certficate is conclusive, and cannot be reviewed by mandamus.—*Reg.* v. *Price* (Law Rep. 6 Q. B. 411) dissented from.—The decision of a Divisional Court discharging a rule for a mandamus to such Commissioners to grant such certificate, which certificate if given would be a protection to the witness against criminal proceedings for bribery, does not relate to a criminal cause or matter, within the meaning of the Supreme Court of Judicature Act, 1873, s. 47, and the Court of Appeal is not therefore deprived of jurisdiction to hear an appeal against such decision. The Queen *v.* Holl - - - - - C. A. 575

2. —— *Election Petition—Witnesses—Expenses—Certificate of Registrar—Taxation by Master—*31 & 32 *Vict. c.* 125, *ss.* 34, 41, *and Rules.*] Although the amount of the reasonable expenses to be paid to any witness in an election petition may, under 31 & 32 Vict. c. 125 (the Parliamentary Elections Act, 1868), s. 34 and r. 5, of its Additional General Rules, January, 1875, be ascertained and certified by the registrar, his certificate is not conclusive of the amount as between the petitioner and respondent, but it is, as part of the general costs of the petition, subject under s. 41 to taxation by a master who must exercise his discretion on the expenses certified. McLaren *v.* Home - - - - - - 477

3. —— *Oath of Allegiance—Claim to affirm—Parliamentary Oaths Act*, 1866 (29 *Vict. c.* 19)—*Promissory Oaths Act*, 1868 (31 & 32 *Vict. c.* 72)—*Penalty—Action by Common Informer—Evidence Further Amendment Act*, 1869 (32 & 33 *Vict. c.* 68)—*Evidence Amendment Act*, 1870 (33 & 34 *Vict. c.* 49.]. The defendant was sued under the Parliamentary Oaths Act, 1866, for a penalty for sitting and voting in the House of Commons without having made and subscribed the oath appointed by that Act, as amended by the Promissory Oaths Act, 1868, to be taken by members. Sect. 4 of the Act of 1866 provides that "Quakers and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath" may, instead of taking and subscribing the oath, make an affirmation in the form given by the Act. The defendant pleaded that he was a person who by reason of the Evidence Further Amendment Act, 1869, and the Evidence Amendment Act, 1870, was by law permitted to make a solemn affirmation, instead of taking an oath, because an oath would have no binding effect on his conscience, and that he came within the exemption of the Parliamentary Oaths Act, 1866, and that he had duly made an affirmation in conformity with that Act before sitting and voting. On demurrer:—*Held* (by the Court of Appeal, Bramwell, Baggallay, and Lush, L.JJ., affirming the judgment of Matthew, J.), that s. 4 of the Parliamentary

PARLIAMENT—*continued.*

Oaths Act, 1866, exempted only persons having a general right to affirm on all occasions on which otherwise they would take an oath, and that the defence was therefore bad, as the Evidence Further Amendment Act, 1869, and the Evidence Amendment Act, 1870, applied only to persons called to give evidence as witnesses. The plaintiff replied that the defendant was a person who, by want of religious belief, was not entitled by the Parliamentary Oaths Act, 1866, or the Promissory Oaths Acts, 1868, to make and subscribe a solemn affirmation. On demurrer:—*Held* (by Mathew, J.), that the reply was bad, as the statute contains no proviso that none but persons of religious belief were or could be entitled to the benefit of the exemption in s. 4 from taking the oath. A penalty incurred under the Parliamentary Oaths Act, 1866, may be recovered by a common informer, per the Court of Appeal (Bramwell, Baggallay, and Lush, L.JJ.) Where there are cross appeals on cross demurrers before the Court of Appeal, and the burden of proof lies on the defendant, so that if he fails in his appeal the cross appeal becomes immaterial, the defendant will be entitled to begin. CLARKE *v.* BRADLAUGH - - - - - **C. A. 38**

PATENT—*Novelty—Combination of existing Inventions.*] The plaintiff obtained in 1874 a patent for certain improvements in interlocking apparatus for railway points and signals. Patents had been previously obtained in 1870 and 1871 for inventions of apparatus for similar purposes. In an action for infringement of the plaintiff's patent of 1874 by the defendants it was admitted by the plaintiff's witnesses that, taking the two inventions of 1870 and 1871 together, and discarding all superfluous parts, every element of the patent of 1874 was to be found in one or other of those inventions; and that no new result was obtained by their combination in the patent of 1874 different from that which had been obtained by the previous inventions, but it was contended for the plaintiff that the combination of the two inventions of 1870 and 1871, effected by the plaintiff's invention of 1874, required such an exercise of skill and ingenuity as to constitute the subject of a valid patent. There was, however, evidence, with which the Court was satisfied, to shew that any person of ordinary skill and knowledge of the subject, placing the two inventions of 1870 and 1871 side by side, could effect the combination of the two in a manner similar to that of the plaintiff's invention without making any further experiments or obtaining any further information:—*Held*, that the plaintiff's invention was not of sufficient novelty to constitute the subject of a valid patent. SAXBY *v.* GLOUCESTER WAGGON COMPANY - - - - - - **305**

PENALTY—*Action for—Limitation of Time—Selling Silver Wares with Counterfeit Mark—"Party grieved"—7 & 8 Vict. c. 22, s. 3—3 & 4 Wm. 4, c. 42, s. 3—Common Informer—31 Eliz. c. 5.*] An action by an officer of one of the Company of Goldsmiths mentioned in 7 & 8 Vict. c. 22, for penalties under s. 3 of that Act, is not an action by a common informer within 31 Eliz. c. 5, nor is it an action by a "party grieved" within 3 & 4 Wm. 4, c. 42, s. 3, and consequently can be brought more than two years after the cause of action accrued:—So *held*, reversing the judgment of the Queen's Bench Division. ROBINSON *v.* CURREY - - - - - **C. A. 465**

POOR LAW—*Husband and Wife—Non-liability of Husband to maintain Adulterous Wife—31 & 32 Vict. c. 122, s. 33.*] A husband is not liable to be ordered, under 31 & 32 Vict. c. 122, s. 33, to maintain a wife with whom he has ceased to cohabit in consequence of her adultery. CULLEY *v.* CHARMAN - - - - - - - **89**

2. —— *Illegitimate Child under Sixteen—Derivative Settlement—39 & 40 Vict. c. 61, s. 35.*] Under 39 & 40 Vict. c. 61, s. 35, illegitimate children under sixteen do not take the settlement of their mother where such settlement has been derived from her marriage, although the birth of the children and the marriage of the mother were before the passing of the Act. THE GUARDIANS OF FULHAM *v.* GUARDIANS OF PORTSEA - **384**

3. —— *Settlement by Residence—Penitentiary—"Bonâ fide Charitable Gift"—54 Geo. 3, c. 170, s. 6—9 & 10 Vict. c. 66, s. 1—39 & 40 Vict. c. 61, s. 34.*] A pauper had resided for upwards of three years in a building in the parish of F., occupied as a home or reformatory for women. This home was supported by money collected at church offertories without the parish, and by annual subscriptions and donations from persons resident in all parts of the kingdom; the money being applied in providing for the supervision, instruction, maintenance, and clothing of the inmates. The pauper during the whole term paid no money for her maintenance and clothing:—*Held*, affirming the judgment of the Queen's Bench Division, that the money collected for her maintenance in the home was a "bonâ fide charitable gift," and that she had not been maintained by a rate or subscription raised in a parish in which she did not reside, within the meaning of the proviso to 9 & 10 Vict. c. 66, s. 1, and that she was irremovable from and settled within the parish of F., under 39 & 40 Vict. c. 61, s. 34. GUARDIANS OF FULHAM *v.* GUARDIANS OF THANET - - - **539**

POOR-RATE—*Occupier ceasing to occupy—Liability to pay Rate—Beneficial Occupation—Bridge free of Toll—32 & 33 Vict. c. 41, s. 16.*] An occupier assessed in a poor-rate, but who ceases to occupy before the rate has been wholly discharged, is not relieved by 32 & 33 Vict. c. 41, s. 16, from liability to pay the whole rate, unless some one succeeds or comes into the occupation who is liable to pay a proportionate part of such rate, and, *semble*, that such occupier remains liable to the whole rate until the name of some one liable to be assessed is substituted for his in the rate book.—The Metropolitan Board of Works purchased Putney Bridge of the Fulham Bridge Company, who transferred the bridge to the board under the provisions of an Act of Parliament which required the tolls in respect of the bridge to cease, and enacted that the bridge should be open free to the public and should be maintained by the board, the justices of Surrey paying an annual sum to the board in discharge of the liability of that county to maintain the bridge. Before the transfer of the Fulham Bridge Com-

POOR-RATE—*continued.*

pany received tolls for the passage over the bridge, and were duly assessed in the poor-rate in the parish of Putney in respect of the bridge, and at the time of the transfer there remained undischarged a rate for which the bridge company had been so assessed, and which had been made by that parish for a period extending beyond the transfer:—*Held*, that the board had no beneficial occupation of the bridge in respect of which they were capable of being rated, and that therefore as there was no succeeding occupier liable to be rated the bridge company remained liable for the whole rate. HARE *v.* CHURCHWARDENS OF PUTNEY [C. A. 223

2. —— *Distress Warrant—Power of Justices to delay Execution.*] Justices in issuing a distress warrant for the recovery of poor-rates have no power to order that there shall be any delay in the execution of the warrant. THE QUEEN *v.* HANDSLEY - - - - - 398

PRACTICE—*Action—Bankruptcy of Sole Defendant—Making Trustee a party to the Action—Rules of Court*, 1875, *Order L.*, *r.* 2.] After issue joined in an action by the indorsees against the acceptor of a bill of exchange, in which the defence was that the plaintiffs took the bill without value, and after notice that the defendant had been defrauded of it, the defendant, who was a sole defendant, filed a petition in liquidation, and a trustee was appointed. The Bankruptcy Court refused to restrain the action, but restrained the plaintiffs from enforcing any judgment they might obtain in the action either against the property or person of the debtor, and the trustee declined to admit the plaintiffs' claim:—*Held*, that the Bankruptcy Court was the proper Court in which plaintiffs ought to prove their debt, and that there was no ground for making an order under Order L., rule 2, that the trustee be made a party to the action or be served with notice thereof. BARTER *v.* DUBEUX - - C. A. 413

2. —— *Appeal—Court of Appeal—Jurisdiction—"Criminal Cause or Matter"—Supreme Court of Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 47—*Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 92, 94.] An order was made by justices directing the defendant to fill up an ash-pit, so as to be no longer a nuisance. The Queen's Bench Division made absolute an order for a certiorari to quash this order, on the ground that it was not warranted by the Public Health Act, 1875, ss. 94, 96:—*Held*, that the order of the justices was made in a "criminal cause or matter" within the meaning of the Supreme Court of Judicature Act, 1873, s. 47, and that an appeal from the judgment of the Queen's Bench Division could not be entertained.—*Mellor* v. *Denham* (5 Q. B. D. 467) followed. THE QUEEN *v.* WHITCHURCH - - - - - C. A. 534

3. —— *Appeal—Interlocutory Order—Appeal from Order of Judge at Trial depriving successful Party of Costs—Jurisdiction of Divisional Court.*] At the trial of an action the jury found for the plaintiffs for a sum exceeding the amount which the defendants had paid into court; the judge thereupon gave judgment for the plaintiffs without costs. The High Court of Justice afterwards made an order that the plaintiffs should have their costs. The defendants applied to the Court of Appeal to annul the order of the High Court after the time had elapsed for appealing against an interlocutory order:—*Held*, that the order of the High Court was made on an appeal from a final judgment, and that the application to the Court of Appeal was not too late; but—*Held*, that the High Court had no jurisdiction to entertain an appeal from a final judgment, and that the order giving the plaintiffs their costs must be annulled. MARSDEN *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY - - - - C. A. 641

4. —— *Costs—Short-hand Notes of Evidence at Trial—Special Direction.*] It is competent to this Court to make an order for the allowance, on taxation between party and party, of the expense of the short-hand notes of the evidence given at the trial, as part of the costs of a rule for a new trial on the ground that the verdict was against the weight of evidence, in a case where from the nature and extent of the evidence it is manifest that the matter could not have been properly disposed of without their aid. WATSON *v.* THE GREAT WESTERN RAILWAY COMPANY - 163

5. —— *Costs, Taxation of—Plaintiff succeeding upon one of several Claims—Apportionment under special Order—Order VI. of Rules of Supreme Court* (*Costs*), 1875, *rr.* 30, 32.] The plaintiff sued in respect of three heads of claim, as to two of which he failed, and as to the third recovered a small sum under the award of an arbitrator. By an order of the Court judgment was entered for the plaintiff for the sum so found due, "the plaintiff to be allowed such costs as one of the masters may find that he has rightly incurred in recovering the above amount; and the defendants to be allowed such costs as they have rightly incurred in defending themselves on those points on which they have succeeded."—On the taxation the master allowed the plaintiff the general costs of the cause, disallowing only those items which applied exclusively to the parts of his claim on which he failed; and he allowed the defendants such costs only as were incurred by them by reason exclusively of the two items of claim which they successfully resisted:—*Held*, that the taxation must be reviewed, for the master ought to have allowed to each party the costs applicable to the portion of the claim upon which he or they respectively had succeeded, and apportioned the general costs of the cause.—Rules 30 and 32 of Order VI. of the Rules of the Supreme Court (Costs), 1875, apply only where particular items are objected to, not where the general principle of the taxation is challenged. SPARROW *v.* HILL - - - - 362

6. —— *Discovery and Inspection—Affidavit of Documents—Privilege—Order XXXI.*, *rr.* 11, 12.] The defendants in an affidavit of documents made pursuant to Order XXXI., rule 12, stated as follows:—"We have in our possession or power certain documents numbered 101 to 110 inclusive, which are tied up in a bundle marked with the letter A., and initialed by the deponent" C. G.; "the said documents relate solely to the case of the defendants and not to the case of the plaintiff, nor do they tend to support it, and they do not,

PRACTICE—*continued.*

to the best of our knowledge, information, and belief, contain anything impeaching the case of the said defendants, wherefore we object to produce the same, and say they are privileged from production." A judge at chambers and the Divisional Court (W. Williams, J., dissenting) refused to order, under Order XXXI., rule 11, the production of the documents which the defendants so objected to produce:—*Held*, by the Court of Appeal, that the affidavit sufficiently described such documents for the purpose of identification, and that as the affidavit was conclusive against the plaintiff seeking inspection, the judge and the Divisional Court rightly refused to order their production. BEWICKE *v.* GRAHAM - **C. A. 400**

7. —— *Production of Documents by Plaintiffs—Action brought in the Name of Third Parties.*] Goods shipped by R. & Co. having been lost at sea, the underwriters, who had insured the cargo, paid R. & Co. for a total loss, and then commenced an action against the shipowners in the name of R. & Co. to recover the value of the goods. An order having been made by consent that the plaintiffs should make an affidavit stating what documents were in their possession relating to the matters in question in the action, and a further order having been made by the master in chambers that both members of the firm of R. & Co. should put in a further and better affidavit, the solicitor of the underwriters deposed that the members of the firm of R. & Co. were abroad, and would not give any further discovery, and that the real plaintiffs had done all they could do to comply with the order:—*Held*, reversing the decision of the Queen's Bench Division, that the case must be treated as if the nominal plaintiffs on the record were suing for their own benefit, and that the making a further affidavit could not be dispensed with. WILSON *v.* RAFFALOVICH - **C. A. 553**

8. —— *Judgment of Nonsuit—Order XVI., rule* 17 *of County Court Orders,* 1875—*Authority to make such Rule—County Courts Act,* 1856 (19 *&* 20 *Vict. c.* 108), *s.* 32.] By Order XVI., rule 17, of County Court Orders, 1875, "any judgment of nonsuit, unless the judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant." Such rule is a copy of Order XLI., rule 6 of the Judicature Orders, and was made by a committee of county court judges with the approval of the Lord Chancellor under the authority of s. 32 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), which authorizes such county court judges with such approval to frame rules and orders "for regulating the practice of the Courts and forms of proceedings therein:"—*Held*, that unless rule 17 of the County Court Orders was ultrà vires a judgment of nonsuit in a county court not appealed against nor set aside, was a bar to an action by the plaintiff for the same debt in the superior Court. *Held*, also (Bramwell, L.J., dissenting), that rule 17 was not ultrà vires but was covered by the authority given to the committee of county court judges by the County Courts Act, 1856, s. 32. POYSER *v.* MINORS - **C. A. 329**

9. —— *Pleading—Counter-claim—Set-off—Incumbents Resignation Act,* 1871 (34 *&* 35 *Vict. c.* 44), *s.* 10.] To a claim in an action brought to recover the arrears of a pension due by virtue of the Incumbents Resignation Act, 1871, the defendant by way of set-off and counter-claim, pleaded that a larger sum than the amount of pension was due to him from the plaintiff upon a judgment, and he claimed to recover the balance —*Held*, by Baggallay and Lush, JJ., that as there can be no set-off to a pension created under the Incumbents Resignation Act, 1871, the set-off and counter-claim must be dismissed.—By Bramwell, L.J., that the plaintiff must have a judgment for the arrears of the pension owing to him, but that the defendant was entitled to a separate and independent judgment for the amount due under the set-off and counter-claim. GATHERCOLE *v.* SMITH [**C. A. 626**

10. —— *Service of Writ out of Jurisdiction—Slander uttered Abroad—Special Damage within Jurisdiction—"Act done"—Order II., rule* 4—*Order XI., rule* 1.] On an application for leave to issue a writ of summons for service out of the jurisdiction, it appeared that the cause of action was an alleged slander uttered abroad and followed by special damage in England:—*Held*, by Denman and Watkin Williams, JJ., that the special damage in England was not an act done within the jurisdiction, so as to give the Court power to allow service of the writ out of the jurisdiction under Order XI., rule 1: *Held*, by the Court of Appeal (Bramwell, Brett, and Cotton, L.JJ.), that the writ ought not to issue, for as it was not shewn that the slander was intended to be transmitted to England the special damage, if it was the cause of action, was not the act of the person who uttered the slander, or an act for which he was responsible, so that there was no act done by him within the jurisdiction within Order XI., rule 1. BREE *v.* MARESCAUX - **C. A. 434**

11. —— *Time from which Writ takes effect—Day, Fractions of—Writ of Summons issued on same Day as Cause of Action accrued—Fiction of Law.*] It appeared from the statement of claim that the writ of summons in the action issued on the 2nd of July, and that on the same day, but before the issuing of the writ, the cause of action arose. The statement of claim was demurred to on the ground that the issuing of the writ of summons being a judicial act must be considered as having taken place at the earliest moment of the day, and therefore before the cause of action accrued:—*Held*, that the Court could for this purpose take cognizance of the fact that the writ did not issue till later in the day than the cause of action accrued, and that the statement of claim was therefore good. CLARKE *v.* BRADLAUGH **151**

—— Appeal—Criminal matter - - **575**
See PARLIAMENT.

PRESCRIPTION—Fishery—Claims of inhabitants of borough—Navigable river - **106**
See FISHERY.

PRINCIPAL AND AGENT—*Undisclosed Principal—Consignor and Consignee—Sub-contract—Privity of Contract—Right to follow Goods or Proceeds—Trustee.*] The plaintiffs, who were landowners in New Zealand, were in the habit of shipping wheat from New Zealand to England for sale on the London market, taking bills of lading which made the wheat deliverable to themselves

PRINCIPAL AND AGENT—*continued.*
in London, and indorsing these bills to M. & T., merchants and factors at Glasgow, with instructions to sell the wheat in London. M. & T. having no house or agency in London were themselves in the habit of indorsing these bills of lading to the defendants, who were cornfactors and brokers in London, for the purpose of their selling there the wheat. When any sales were effected, M. & T. delivered account sales to the plaintiffs in the usual form, deducting a del credere commission of 3*l.* per cent., whilst the terms upon which the defendants were employed by M. & T. were different, being a factorage of 2*l.* per cent. and not a del credere commission. The indorsement of the bills of lading by the plaintiffs to M. & T. and by M. & T. to the defendants, was in each case only for the purpose of selling the wheat and without the intention of passing any property in it. The plaintiffs knew that the sales effected for them by M. & T. in London were made by brokers employed by M. & T., but the plaintiffs were in no way parties to the particular contracts of sale, nor were their names disclosed upon them. The defendants effected sales of certain cargoes of wheat which had been so consigned for sale by the plaintiffs in the above mode, and paid the proceeds into their own account with their bankers, and from time to time made remittances to M. & T. on account of them; but upon reference to the defendants' books of account the proceeds of the particular cargoes could be separated and identified.—M. & T. carried on a business at Leith as well as at Glasgow, and they employed the defendants in respect of both, and when they stopped payment, which they did, they were indebted to the defendants upon the Leith account but not on the Glasgow account.—The plaintiffs having brought an action against the defendants for the net balance of the proceeds of the said cargoes of wheat after deducting the remittances made to M. & T. in respect thereof, but without giving credit due to them from M. & T. on other transactions, the jury found at the trial, first, that the plaintiffs did not, through their agents, employ the defendants to sell and account for the proceeds of the wheat; secondly, that the defendants knew, or had reason to believe, that M. & T. were acting in the sales as agents for a third person:—*Held*, reversing the judgment of Field, J., that the plaintiffs were not entitled to recover, as there was no privity of contract between them and the defendants, and the defendants did not stand in any fiduciary character towards the plaintiffs so as to entitle the latter to follow the proceeds of their property in the defendants' hands, and as whatever right the plaintiffs might have had as owners to claim the wheat before it had been sold, they had no right, after such sale, to the proceeds, without giving credit for the sum due to the defendants from M. & T., on their general account. New Zealand and Australian Land Company *v.* Watson [**C. A. 374**

RAILWAY COMPANY—*By-law, Validity and Construction of*—8 *Vict. c.* 20, *ss.* 103, 109.] By a by-law of a railway company "any person travelling without special permission of some duly authorized servant of the company, in a carriage or by a train of a class superior to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40*s.*, and shall, in addition, be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started, unless he shews that he had no intention to defraud." The defendant, with the intention of defrauding the company, travelled in a carriage of a superior class to that for which his ticket was issued, and having been charged under the by-law was convicted in a penalty of 10*s.* and costs:—*Held*, that the by-law was illegal and void, for assuming that it could be divided after the words "penalty of 40*s.*" and that each part was capable of being enforced apart from the other, the first part was repugnant to 8 Vict. c. 20, s. 103, which makes a fraudulent intention the gist of the offence of travelling without having paid the fare, and that, if taken as a whole and indivisible, it was unreasonable according to *Watson* v. *London and Brighton Ry. Co.* (4 C. P. D. 118), and *Saunders* v. *South Eastern Ry. Co.* (5 Q. B. D. 456):—*Held*, further, that the conviction must be quashed, for it was founded upon the by-law, and could not be upheld as disclosing an offence under 8 Vict. c. 20, s. 103. Dyson *v.* London and North Western Railway Company - - **32**

2. —— *Liability to fence against adjoining Lands—Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 68—*Injury to Cattle—Owner releasing Right to Accommodation Works—Rights of Occupier.*] The plaintiff in 1846 became tenant from year to year of land belonging to one G. In 1847 the defendants, a railway company, acquired part of the land in the exercise of their statutory powers, and by arrangement with G. paid him compensation in lieu of all accommodation works, including the right to have his land fenced from the railway, G. releasing the defendants from their statutory obligation in that respect. The defendants, however, made a fence of posts and rails between the land so occupied by the plaintiff and a ditch in the defendant's land adjoining the railway, and they planted a hedge on the side of the ditch nearest the railway itself, sufficient to prevent animals from straying thereon. They, however, neglected to keep up the posts and rails, and in consequence of their neglect to do so a cow belonging to the plaintiff, in 1879, whilst the plaintiff so continued in the occupation of the land under the original tenancy which had never been determined, fell into the ditch and was killed:—*Held*, affirming the decision of the Common Pleas Division, that the defendants were liable for the loss of the cow, for that their arrangement with the owner did not exonerate them from their liability under the Railway Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 68, to maintain the fence for the benefit of the occupier, and so as to prevent his cattle from straying from his land. Corry *v.* Great Western Railway Company - **C. A. 322**

3. —— *Regulation of Railways Act*, 1873, 36 & 37 *Vict. c.* 48—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Excessive Charges for Conveyance of Passengers by Railway*

RAILWAY COMPANY—*continued.*

—*Neglect to afford "Reasonable Facilities"—Jurisdiction of Railway Commissioners.*] The mere fact that railway companies make charges for the conveyance of passengers in excess of those authorized by their special Acts, but without any undue preference, is not a breach of their obligation under 17 & 18 Vict. c. 31, s. 2, to "afford according to their respective powers all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively and for the return of carriages, trucks, boats, and other vehicles." And the Railway Commissioners have no jurisdiction to grant an injunction to restrain the making of such excessive charges.—*Semble*, per Brett, L.J., and Cotton, L.J., that if the overcharges were of such an amount and of such a nature that they had the effect, or it could be presumed that they were made with the intention, of preventing the use by passengers of particular trains and stations, the Commissioners might have jurisdiction to entertain a complaint in respect of them as being a refusal of "facilities" within the meaning of 17 & 18 Vict. c. 31, s. 2. Great Western Railway Company *v.* Railway Commissioners - - - **C. A. 182**

REGISTRATION—Bill of sale—Inventory **80**
See Bill of Sale.

REPAIRS—Highway—Gathering stones—Inclosed land - - - - **210**
See Highway.

REVENUE—*Income Tax—Foreign Corporation—Dividends to Shareholders in the United Kingdom—Dividends instrusted to Agents for Payment—16 & 17 Vict. c.* 34, *s.* 10.] A foreign company carrying on business and earning profits abroad, had an agency in London which conducted a branch and earned profits. The dividends of the company were payable, at the option of the shareholders, abroad or by the London agency. In a particular year the London agency earned an amount of profits which enabled them to pay all the dividends demanded of them in that year without requiring or obtaining any remittance from the company abroad. The London agency were assessed to income tax under Schedule D on the profits earned in the United Kingdom on an average of the three preceding years, the amount on which they were so assessed being less than the amount actually earned by them in that year. They further made a return under 16 & 17 Vict. c. 34, s. 10, that no interest, dividends, or other annual payments payable out of or in respect of the stock, funds, or shares of the company had been intrusted to them for payment in the United Kingdom, and appealed against an assessment of the Commissioners whereby they were assessed in respect of the dividends paid by them:—*Held*, affirming the judgment of the Exchequer Division, that the London agency were intrusted with the payment of dividends in the United Kingdom, within the meaning of 16 & 17 Vict. c. 34, s. 10, and that they were liable to be assessed on the full amount of the dividends they so paid in the year, but that since the dividends were payable out of the general earnings of the company, consisting of profits made partly in the United Kingdom and partly elsewhere, and the London agency had already been assessed to income tax on the former under Schedule D, they ought not to be further assessed under 16 & 17 Vict. c. 34, s. 10, and pay income tax in respect of that portion of the dividends which represented profits arising out of the United Kingdom. Gilbertson *v.* Fergusson - - - - **C. A. 562**

2. —— *Inhabited House Duty—House, Definition of—Dwelling-house let in different Tenements—41 Vict. c.* 15, *s.* 13—*Necessity of structural Severance—Occupation of Part by Landlord—57 Geo.* 3, *c.* 25] The statute 41 Vict. c. 15, s. 13, sub-s. 1, provides that, when any house being one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing at any time during the year of assessment to the surveyor of taxes stating therein the facts, and after the receipt of such notice by the surveyor the Commissioners acting in the execution of the Acts relating to the inhabited house duties shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed if it had been a house comprising only the tenements other than such as are occupied as aforesaid or are unoccupied:—*Held*, that the provisions of the sub-section only apply in cases where the house is divided into different tenements structurally severed from each other, as for instance in the case of flats and sets of chambers.—Where a part on the ground floor and basement of a building was severed from the rest of the building by a party wall, and had its own separate entrance, there being no communication between it and the rest of the building, and the part so separated was used wholly for the purposes of a bank:—*Held*, that such part of the premises constituted a separate house, and being used solely for business purposes was exempt from inhabited house duty.—*Semble*, per Hawkins, J., that, when a house is substantially within the words of the sub-section above referred to as being a house structurally divided into and let in different tenements, the mere fact that the landlord occupied one of such tenements forming a small portion of the whole, would not disentitle him to the relief given by the sub-section. Chapman *v.* Royal Bank of Scotland - - - - - - **136**

3. —— *Income Tax—Coal Mines—Partnership—Incorporation of—Succession—Diminution of Profits from Extraordinary Depression of Trade—"Specific Cause"—5 & 6 Vict. c.* 35, *Scheds. A and D—Rules—29 Vict. c.* 36, *s.* 8.] A partnership, after working certain coal mines for more than five years, was on the 21st of December, 1875, incorporated as a limited company, and sold to the company the assets, subject to the liabilities, of the partnership. The partners became holders of all the shares in the limited company according to their interests. After the 3rd of August, 1876,

REVENUE—*continued.*

changes took place in the shareholders. The company, being assessed by the Income Tax Commissioners to the income tax under 5 & 6 Vict. c. 35, Sched. D. for the year ending the 5th of April, 1877, on an average of the five preceding years, appealed, and contended that they were only to pay on a computation for one year on the average of the profits from the 21st of December, 1875, the date of the incorporation.—The Commissioners stated a case in which they found that "the profits and gains of the appellants' business had fallen short since the 21st of December, 1875, from the following specific causes, viz., "the extraordinary depression in the iron and coal trades whereby the appellants were unable to sell either so large a quantity of their coals as they had formerly been enabled to do, or to obtain anything like so good a price for such coals." Figures shewing that the annual profits had fallen short by one-half were set out:—*Held*, That Sched. A, rule 4, clause 6, which prescribes that if it shall appear that the account required by the rules "cannot be made out by reason of the possession or interest of the party to be charged thereon having commenced within the time for which the account is directed to be made out, the profits of one year shall be estimated in proportion to the profits received within the time elapsed since the commencement of such possession or interest," did not apply.—That the business was a "trade . . . adventure or concern," within Sched. D, rule 1, of the rules for ascertaining the duties to be charged thereon, and was not within the terms of the proviso "set up and commenced" within the period of three years.—That the company was a new association carrying on an old concern; and had "succeeded" to it within clause 4 of the third set of Rules in Sched. D, but that, since such succession, the profits had fallen short from a "specific cause" within the exception in that clause.—And that the sixth case of the said rules applied, and under it the computation should be made "on the amount of the full value of the profits and gains received annually," i.e. for the current year. RYHOPE COAL COMPANY *v.* FOYER - - 485

4. —— *Income Tax—Foreign Telegraph Company—Marine Cables—Exercising Trade in England—Messages forwarded from England to remote Parts of World*—16 & 17 *Vict. c.* 34; 5 & 6 *Vict. c.* 35.] The appellants, a foreign company, domiciled in Copenhagen, had three marine cables in connection with Aberdeen and Newcastle, communicating with the telegraph lines of the Post Office in the United Kingdom. They had also workrooms with clerks, in London, Newcastle, and Aberdeen. Messages from this country were forwarded over the lines of the Post Office and the cables of the appellants to Denmark and thence by their wires and the wires of foreign governments, to Russia, China, Japan, and India. The total charges paid for transmitting such messages were collected by the Post Office, and after deducting their dues handed to the appellants, who retained the amount due to them for the transmission of messages over their cables and lines, and paid the residue to the various governments and companies respectively entitled to it. No profits were made by the appellants from the transmission of messages over the land lines in the United Kingdom:—*Held*, that the appellants must be taken to exercise a trade in the United Kingdom under 16 & 17 Vict. c. 34, s. 2, and that they were chargeable to income tax on the balance of profits or gains from their receipts in this country from the transmission of messages. ERICHSEN *v.* LAST - - - - 12

RIOT — *Action against Hundred — Damage to Houses—Larceny therefrom by Rioters—Felonious Demolition—Intention to destroy—Evidence—Compensation from Hundred*—7 & 8 *Geo.* 4, *c.* 31, *s.* 2; 24 & 25 *Vict. c.* 97, *ss.* 11, 12.] A house damaged by rioters is not "feloniously demolished wholly or in part" so as to entitle the person damnified to compensation from the Hundred under 7 & 8 Geo. 4, c. 31, s. 2, unless the rioters when attacking the house had an intention wholly to destroy it.—During an election riot, and before the Riot Act was read, the rioters attacked many houses, broke the windows and damaged the walls by throwing stones, and stole tobacco from a house so damaged:—*Held*, that there was no evidence of felonious demolition for which the Hundred was liable to compensate the persons damnified. DRAKE *v.* FOOTITT. DRAKE *v.* HANKIN - - 201

RIVER—Oyster fishery—Claim of inhabitants—Prescription - - - 106
See FISHERY.

RULES—Order II., r. 4 - - - 434
See PRACTICE. 10.

—— Order VI., rr. 30, 32—(*Costs*) - - 362
See PRACTICE. 5.

—— Order XI., r. 1 - - - - 434
See PRACTICE. 10.

—— Order XXI., rr. 11, 12 - - - 400
See PRACTICE. 6.

—— Order XLII., r. 5 - - - 623
See COUNTY COURT.

—— Order L., r. 2 - - - - 413
See PRACTICE.

SALE OF GOODS—*Manufacturer—Implied Contract that Goods are of Manufacturer's make—Evidence—Custom.*] On the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, there is, in the absence of any usage in the particular trade or as regards the particular goods to supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make.—The plaintiffs, who were manufacturers but not dealers in iron, by a written contract, on the margin of which was their trade-mark (a crown with their initials), contracted to sell to the defendants, who thereby contracted to buy of the plaintiffs 2000 tons of ship-plates of the quality known as "Crown," to pass Lloyd's survey, to be delivered monthly, at the defendants' shipyard. The contract contained a strike clause by which the supply of the iron contracted for might be suspended during the continuance of any strike of workmen; but it had no express stipulation that the plates should be of the plaintiffs' manufacture. Before the contract was completed the plaintiffs closed their works, and proposed to complete the contract by delivery

SALE OF GOODS—*continued.*
of ship-plates of the quality mentioned in the contract made by another firm. The defendants having refused to accept these, the plaintiffs sued them for breach of contract.—At the trial the defendants tendered evidence to shew that in the iron trade there is a custom that, under a contract between a manufacturer of iron plates and a customer for the supply of them, the seller must, in the absence of stipulation to the contrary, supply plates of his own make, and that the purchaser is entitled to reject other plates if tendered though of the quality contracted for. The learned judge at the trial rejected this evidence, and gave judgment for the plaintiffs :—*Held*, that such evidence was improperly rejected.—*Held*, also, by Brett and Cotton, L.JJ. (Bramwell, L.J., dissenting), that without such evidence the defendants were entitled to succeed, as the contract implied that the plates to be supplied should be of the manufacture of the plaintiffs, and that therefore the plaintiffs could not require the defendants to accept plates not of their own manufacture even though of the quality contracted for and as good as those made by the plaintiffs themselves. Johnson *v.* Raylton [C. A. 438

—— Delivery by instalments - - 92
See Contract. 3.

SALVAGE—Navigation by pilot—Danger - 129
See Ship. 2.

SCHOOL BOARD—Attendance order—Child attending without fees - - 388
See Elementary Education.

—— Neglect to educate child—Child not in custody of parent - - - 502
See Elementary Education. 2.

SET-OFF—Pleading - - - 626
See Practice. 9.

SETTLEMENT—Poor law—Illegitimate child under sixteen - - - 384
See Poor Law.

—— Poor law—Penitentiary - - 539
See Poor Law.

SEWER—Accumulation of water—Negligence—Liability of Metropolitan Board of Works [418
See Metropolis Local Management Acts.

SHIP—*General Average—Deck Cargo.*] The plaintiffs shipped certain cattle as a deck cargo on board the defendants' vessel: during the voyage a storm arose, and owing to stress of weather the master jettisoned the deck cargo by throwing the cattle overboard. The act of jettison was proper and necessary on the part of the master for the safety of the defendants' vessel :—*Held*, that the plaintiffs could not recover from the defendants a general average contribution for the loss of the cattle.—*Johnson* v. *Chapman* (19 C. B. (N.S) 563; 35 L. J. (C.P.) 23) commented on.—Wright *v.* Marwood. Gordon *v.* Marwood - C. A. 62

2. —— *Pilot—Salvage.*] When a pilot has assisted in navigating a vessel from a dangerous situation to a safe anchorage, the test, whether he is entitled to be remunerated for salvage services, is not, on the one hand, whether the vessel was at the time of succour in distress, or, on the other hand, whether she was then damaged; but the test is whether the risk attending the services to the vessel was such, that the pilot could not be reasonably expected to perform them for the ordinary pilot's fees, or even for extraordinary pilotage reward.—A vessel was, during a heavy storm, being driven to leeward towards dangerous sands: her captain was ignorant of the locality, and her loss appeared almost inevitable: some pilots, seeing her danger, put off to sea at the peril of their lives in order to assist her; they were unable to board her by reason of the height of the sea: but by preceding her and signalling to her, they guided her to a safe anchorage. The vessel had sustained no damage :—*Held*, that the pilots were entitled to be remunerated for salvage services. Akerblom *v.* Price - C. A. 129

3. —— *Engaging or supplying Seamen or Apprentices—Owner—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 147, *sub-s.* 1.] By s. 147, sub-s. 1, of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), if any person not licensed by the Board of Trade other than "the owner or master or mate of a ship, or some person who is bonâ fide the servant and in the constant employ of the owner, or a shipping master duly appointed as aforesaid, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom," he incurs a penalty.—The respondent having bonâ fide contracted to purchase one sixty-fourth share in a British ship from P., who, though not registered as the owner, had the full possession and control of the ship under a contract to purchase the sixty-four shares, supplied an apprentice to P. who engaged the apprentice for the ship :—*Held*, that the respondent was an "owner" within the meaning of the exemption, since though not a registered owner he had a contract enforceable in Equity for the purchase of a share in the ship. Hughes *v.* Sutherland - - - - - - 160

—— Re-insurance—Voyage over when policy effected - - - - 456
See Insurance (Marine). 2.

SOLICITOR AND CLIENT—*Refusal by Town Agent of Solicitor to pay to lay Client—Amount of Debt received in an Action—Summary Jurisdiction of the Court over its own Officer.*] The town agent of the solicitor of the plaintiff in an action, in which judgment had been recovered for a debt of 35*l.* 5*s.* and costs, refused to pay over to the plaintiff the amount of the debt which had been received by him from the sheriff under a writ of fi. fa., on the ground that he was entitled to retain such amount for a debt due to him from the country solicitor of equal amount. The country solicitor had no lien on such amount against his client, the plaintiff :—*Held*, that the Court, in the exercise of its summary jurisdiction over its own officers, would order the town agent to pay over the amount of the debt to the plaintiff. Ex parte Edwards 155

STAMP—*Debenture or Promissory-note*—33 & 34 *Vict. c.* 97, *s.* 18, *and Sched.*—"*Debenture*"—*Joint Stock Company.*] An instrument issued by a company incorporated under the Joint Stock Companies Acts, 1856 and 1862, purporting upon the face of it to be a "debenture," with coupons for the payment of interest half-yearly attached to it, and containing an engagement on the part

STAMP—*continued.*
of the company to pay "the amount of this indenture" to A. B. or order on a given day, with interest at 5 per cent., is under the Stamp Act, 1870, chargeable with a debenture-stamp at 2*s.* 6*d.*, and not with a promissory-note stamp. British India Steam Navigation Company *v.* Commissioners of Inland Revenue - 165

STATUTES:
5 Eliz. c. 23, s. 11 - 273
See Ecclesiastical Law.
31 Eliz. c. 5 - 465
See Penalty.
53 Geo. 3, c. 127, s. 1 - 273
See Ecclesiastical Law.
54 Geo. 3, c. 170, s. 6 - 539
See Poor Law.
57 Geo. 3, c. 25 - 136
See Revenue. 2.
7 & 8 Geo. 4, c. 31, s. 2 - 201
See Riot.
9 Geo. 4, c. 61, ss. 4, 13, 14 - 238
See Licensing Acts.
2 & 3 Wm. 4, c. 93, s. 1 - 273
See Ecclesiastical Law.
3 & 4 Wm. 4, c. 42, s. 3 - 465
See Penalty.
5 & 6 Wm. 4, c. 50, s. 51 - 210
See Highway.
—— c. 76, s. 57 - 348
See Municipal Corporation.
5 & 6 Vict. c. 35 - 12
See Revenue. 4.
—— —— scheds. A. and D. - 485
See Revenue.
7 & 8 Vict. c. 22, s. 3 - 465
See Penalty.
8 Vict. c. 20, ss. 103, 107 - 32
See Railway Company.
8 & 9 Vict. c. 20, s. 68 - 322
See Railway Company.
—— c. 106, s. 9 - 524
See Bankruptcy.
9 & 10 Vict. c. 66, s. 1 - 539
See Poor Law.
10 Vict. c. 17, s. 37—43 - 505
See Waterworks Company.
14 & 15 Vict. c. 81, s. 1 - 18
See Criminal Law. 2.
—— c. 94 - 295
See Mine.
16 & 17 Vict. c. 34 - 12
See Revenue. 4.
—— —— s. 10 - 562
See Revenue.
17 & 18 Vict. c. 31 - 182
See Railway Company. 3.
—— c. 104, s. 147, sub-s. 1 - 160
See Ship. 3.
18 & 19 Vict. c. 120, ss. 135, 136 - 418
See Metropolis Management Acts.
19 & 20 Vict. c. 108, s. 32 - 329
See Practice. 8.

STATUTES—*continued.*
19 & 20 Vict. c. 108, s. 72 - 425
See County Court.
24 & 25 Vict. c. 70, ss. 8–12 - 313
See Highway.
—— c. 97, ss. 11, 12 - 201
See Riot.
—— c. 100, s. 4 - 244
See Criminal Law. 3.
26 & 27 Vict. c. 29, s. 7 - 575
See Parliament.
28 & 29 Vict. c. 83, s. 3, 4, 7 - 313
See Highway.
29 Vict. c. 19 - 38
See Parliament. 3.
—— c. 36, s. 8 - 485
See Revenue.
30 & 31 Vict. c. 142, s. 31 - 425
See County Court.
31 & 32 Vict. c. 72 - 38
See Parliament. 3.
—— c. 122, s. 33 - 89
See Poor Law.
—— c. 125, ss. 34, 41, and Rules - 477
See Parliament. 2.
32 & 33 Vict. c. 41, s. 16 - 223
See Poor-rate.
—— c. 68 - 38
See Parliament.
—— c. 71, s. 55 - 9
See Bankruptcy.
33 & 34 Vict. c. 49 - 38
See Parliament.
—— c. 75, s. 17 - 388
See Elementary Education.
—— c. 97, s. 18 - 165
See Stamp.
34 & 35 Vict. c. 44, s. 10 - 626
See Practice. 9.
35 & 36 Vict. c. 65 - 260
See Bastardy.
36 & 37 Vict. c. 48 - 182
See Railway Company. 3.
—— c. 66, s. 47 - 534
See Practice. 2.
37 & 38 Vict. c. 85, s. 9 - 273
See Ecclesiastical Law.
38 & 39 Vict. 40, s. 1, sub-s. 2 - 369
See Municipal Corporation.
38 & 39 Vict. c. 49 - 542
See Licensing Acts.
—— c. 55, ss. 92, 94 - 534
See Practice. 2.
—— —— ss. 174, 200 - 529
See Local Government Acts.
39 & 40 Vict. c. 61, s. 34 - 539
See Poor Law.
—— —— s. 35 - 384
See Poor Law.
—— c. 79, s. 3 - 502
See Elementary Education. 2.
—— —— ss. 10, 11, 12 - 388
See Elementary Education.

STATUTES—*continued.*
41 Vict. c. 15, s. 13 - - - - 136
See Revenue. 2.
41 & 42 Vict. c. 31 - - - - 80
See Bill of Sale.
—— —— s. 8 - - - - 319
See Bill of Sale.
—— —— ss. 4, 8, 10 - - - 516
See Bill of Sale.
—— —— ss. 8, 10 - - - - 523
See Bill of Sale.
—— —— s. 10 - - - - 520
See Bill of Sale.
—— c. 77, ss. 28, 29, 38 - - - 313
See Highway.
43 & 44 Vict. c. 23, s. 4 - - - 388
See Elementary Education.

TIME—Of writ taking effect—Fraction of day
See Practice. [151

TRICYCLE—Steam power—Locomotive — Highway - - - - - 313
See Highway.

TRUSTEE—Bankruptcy—Default in rendering accounts—Committal for contempt 9
See Bankruptcy.
—— Reputed ownership—Right to follow money
See Bankruptcy. [340
—— Right to follow money—Principal and agent
See Principal and Agent. [374

USAGE — Trade — Implied contract between manufacturer of iron plates and customer
See Sale of Goods. [438

WAREHOUSEMAN—Breach of contract — Damages - - - - 510
See Damages.

WATERWORKS COMPANY—*Workhouse—Supply of Water for Public Purposes—Waterworks Clauses Act,* 1847 (10 *Vict. c.* 17), *ss.* 37–43.] By a special Act, incorporating the Waterworks Clauses Act, 1847, a waterworks company were bound at the request of the owner or occupier of any house to supply such person with water for domestic purposes at a minimum rate, to be increased if such house should be occupied by more than one family, and the Act further provided that a supply of water for domestic purposes should not include a supply of water for baths, washhouses, or public purposes. The Waterworks Clauses Act, 1847, deals with the supply of water for cleansing sewers and drains, cleansing and watering the streets, supplying any public pumps, baths, or washhouses, and imposes a penalty for neglect to supply water "for the public purposes aforesaid":—*Held* (by Lord Coleridge, C.J., Pollock, B., and Manisty, J.), that a workhouse was a house of which the guardians were owners, and the company were bound to supply them with water for domestic purposes, such supply not being a supply "for public purposes" within the meaning of the special Act of the Waterworks Clauses Act, 1847, and that for the purposes of the Special Act the inmates of the workhouse were to be treated as one family and the rate assessed accordingly. Liskeard Union *v.* Liskeard Waterworks Company - - - 505

WORDS—"Bonâ fide charitable gift" - 539
See Poor Law. 3.
—— "Criminal cause or matter" - - 534
See Practice. 2.
—— "Facilities" - - - - - 182
See Railway Company. 3.
—— "Owner" - - - - 160
See Ship. 3.
—— "Public purposes" - - - 505
See Waterworks.

WRIT—Contumace capiendo—Significavit 273
See Ecclesiastical Law.
—— Service out of jurisdiction - - 434
See Practice. 10.
—— Time of taking effect—Fraction of day 151
See Practice. 11.

BIBL.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

4

UL 28 APR 1978